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Supreme Court of the United States

OCTOBER TERM, 1954

No. 51

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, PETITIONER,

vs.

WESTINGHOUSE ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 26, 1954

CERTIORARI GRANTED JUNE 7, 1954

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U.S.C.A. for the Third Circuit	1	1
Appendix to appellant's brief	1	1
Docket entries	1	1
First amended complaint	2	2
Exhibit A—Agreement between Westinghouse Electric Corporation and Federation of Westinghouse Independent Salaried Unions entered into November 1, 1950	9	7
Exhibit B—Supplement I to agreement between Westinghouse Electric Corporation and Federation of Westinghouse Independent salaried Unions, dated November 1, 1950	49	41
Exhibit C—Salary Key Sheet No. 9, Association of Westinghouse Salaried Employees, effective September 18, 1950	51	42
Exhibit D—Manual of Accounting and Industrial Relations, Westinghouse Electric Corporation, December 1950	52	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 10, 1954.

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	Original	Print
Appendix to appellant's brief—Continued		
First amended complaint—Continued		
Exhibits—Continued		
Exhibit E—Agreement between Westinghouse Electric Corporation and Federation of Westinghouse Independent Salaried Unions entered into April 1, 1947	58	48
Exhibit F—Manual of Accounting and Industrial Relations, Westinghouse Electric Corporation, July 1949	81	67
Sub-exhibit A—Manual of Accounting and Industrial Relations, Westinghouse Electric Corporation, July 1947	96a	80
Motion of defendants to dismiss first amended complaint	97	81
Opinion, Marsh, J.	97	81
Order dismissing complaint	107	89
Notice of appeal	107	89
Designation as to the parts of the record to be printed	108	91
Stipulation for extension of time for filing of appellant's brief	109	91
Amended designation	109	91
Stipulation for extension of time for filing of appellant's brief	111	92
Order for reargument	112	93
Opinion, Staley, J.	113	93
Dissenting opinion, Hastie, J.	124	107
Judgment	131	114
Clerk's certificate (omitted in printing)	131	
Order granting certiorari	132	115

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Appendix to Appellant's Brief—Filed January 22, 1953

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 19, 1951 Complaint filed.

Nov. 19, 1951 Summons issued.

Nov. 21, 1951 Summons returned served with copy of complaint on William Miller, Vice President, for Westinghouse Corp., at Union Bank Bldg., on Nov. 20, 1951, at 1:35 A. M.

Dec. 7, 1951 Motion to Dismiss Complaint filed by defendant.

Dec. 7, 1951 Praecipe for Argument List filed by defendant.

May 26, 1952 First amended Complaint filed; Acceptance of service thereon.

May 29, 1952 Hearing before Marsh, J., on Motion to Dismiss; concluded C. A. V. Trial Memor. filed.

Oct. 2, 1952 Opinion and Order of Marsh, J., filed; Order entered that the complaint in the above entitled action be and the same hereby is dismissed, without prejudice to plaintiff by way of amendment to set forth a cause of action upon which relief can be granted.

Oct. 9, 1952 Motion to Dismiss first Amended Complaint, filed by defendant.

Oct. 29, 1952 Notice of Appeal filed by plaintiff.

Oct. 29, 1952 Cost Bond on Appeal filed. ($250.00—Peerless Casualty Co.)

Oct. 30, 1952 Copy of Notice of Appeal mailed Clerk U. S. Court of Appeals; Letters to counsel of record.

Nov. 24, 1952 Original record on appeal mailed Clerk, U. S. Court of Appeals, Philadelphia, Pa.

[fol. 2] IN UNITED STATES DISTRICT COURT

FIRST AMENDED COMPLAINT—Filed May 26, 1952

1. a. Jurisdiction of this Court over the cause of action herein exists by reason of Section 301 of Title III of the Labor Management Relations Act of June 23, 1947, 29 United States Code, Section 185.

b. Jurisdiction of this Court over the cause of action herein also exists by reason of the Declaratory Judgment provisions of the Judicial Code, 28 United States Code, Sections 2201 and 2202.

2. Plaintiff is an unincorporated association organized and existing under the laws of the United States of America and the Commonwealth of Pennsylvania, and is a labor organization within the meaning and scope of the term "labor organization" as said term is defined in the Labor Management Relations Act of June 23, 1947, 29 United States Code, Section 152. Plaintiff maintains its sole office at 709 Braddock Avenue, East Pittsburgh, Pennsylvania.

3. Plaintiff is affiliated with, and a member of, the Federation of Westinghouse Independent Salaried Unions, an unincorporated federation of labor associations, having its sole office at 600 Grant Street, Pittsburgh, Pennsylvania.

4. Plaintiff brings this action both in its individual capacity and interest as a labor organization, and in a representative capacity in behalf of the employees whom it represents, as more fully set forth hereinafter.

5. Defendant is a corporation of the Commonwealth of Pennsylvania, engaged in the manufacture and sale of [fol. 3] electrical equipment in interstate commerce, and has a principal office at Gateway Building No. 3, Pittsburgh, Pennsylvania.

6. Plaintiff was, on and before April 3, 1951, and has continued to the date hereof to be, the bargaining representative for not less than five thousand (5000) salaried employees at the Defendant's East Pittsburgh, and Homewood, Pennsylvania works, in two bargaining units, to wit:

(*b*) All salaried employees of the Defendant in its East Pittsburgh offices and plants (including offices

and plants at Trafford, Turtle Creek, and Linhart, Pennsylvania) including all junior and senior order clerks in the shipping department, all junior tool designers, associate tool designers, tool designers, and senior tool designers, but excluding telephone maintenance employees and supervisory employees.

(b) All salaried employees of the Defendant in its Manufacturing and Repair Departments and Central District Accounting Department who are located at its Homewood office and plant, except Confidential Secretaries (including the Secretary to the Central District Industrial Relations Representative) and supervisory employees.

7. The employees set forth in paragraph 6 hereof are engaged in an industry "affecting commerce", within the meaning of the said term "affecting commerce" as defined in the Labor Management Relations Act of 1947, 29 United States Code, Section 152.

8. For not less than ten years prior to April 3, 1951, Plaintiff has represented salaried employees of Defendant at Defendant's East Pittsburgh, and Homewood, Pennsylvania works.

[fol. 4] 9. On or about November 1, 1950, Plaintiff, as collective bargaining agent for those of Defendant's employees who are set forth in paragraph 6 hereof, through and in conjunction with its duly authorized agent, the Federation of Westinghouse Independent Salaried Unions, entered into a written contract with Defendant, covering the terms and conditions of employment of said employees, for a period of not less than one year from said date, a true and correct copy of said contract being attached hereto, made a part hereof by reference thereto, and marked Exhibit "A".

10. On or about November 1, 1950, Plaintiff, as collective bargaining agent for those of Defendant's employees who are set forth in paragraph 6 hereof, and in conjunction with its duly authorized agent, the Federation of Westinghouse Independent Salaried Unions, entered into a written contract with Defendant, supplementing the contract set forth in Exhibit "A", a true and correct copy of said

supplemental contract being attached hereto, made a part hereof by reference thereto, and marked Exhibit "B".

11. On or about November 16, 1950, pursuant to and in accordance with the contractual obligations of Exhibit "A" as supplemented by the provisions of Exhibit "B", Plaintiff, and Defendant placed into effect a schedule of minimum and maximum monthly salaries to be paid by the Defendant for each type of salaried job then being performed by the employees set forth in paragraph 6 hereof; said schedule, however, being made effective as of September 18, 1950. A true and correct copy of said schedule is attached hereto, made a part hereof by reference thereto, and marked Exhibit "C".

[fol. 5] 12. On or about April 1, 1951, pursuant to and in accordance with the procedures set forth in Exhibits "A" and "B", as limited by Exhibit "C", Defendant established a specific monthly salary in dollars, for each individual employee in the groups set forth in Paragraph 6 hereof, which specific monthly salary Defendant, under the provisions of Section VI of Exhibit "A", contracted to pay to each of such employees for the work performed by him during the month of April, 1951.

13. On and after November 1, 1950, under and by reason of the provisions of paragraph G of Section VI of Exhibit "A", Defendant was contractually obligated to maintain without reduction, the specific individual monthly salaries set forth in paragraph 12 hereof, unless and until the procedures set forth in said paragraph G were followed and complied with.

14. On or about November 1, 1950, Plaintiff entered into a written contract with Defendant, specifying, *inter alia*, the circumstances under, and periods of time for which the Defendant would be obligated to pay the employees set forth in paragraph 6 hereof, their individual salaries, in the event that any of such employees were absent from work due to sickness or disability. The pertinent and essential terms of said contract were set forth in a certain writing prepared by Defendant in or about the month of December, 1950, and through mutual acquiescence and continuous use by the Plaintiff and Defendant thereafter, said

certain writing was adopted by the plaintiff and Defendant as part of their contract, a true and correct copy of said certain writing being attached hereto, made a part hereof by reference thereto, and marked Exhibit "D".

15. On or about April 1, 1947, Plaintiff, as collective bargaining agent for those of Defendant's employees who [fol. 6] are set forth in paragraph 6 hereof, and in conjunction with its duly authorized agent, The Federation of Westinghouse Independent Salaried Unions, entered into a written contract with Defendant, covering the terms and conditions of employment of said employees, said contract, as supplemented, having been extended, from time to time, to on or about the 31st day of March, 1950, and said contract as supplemented, being attached hereto, made a part hereof by reference thereto, and marked Exhibit "E".

16. In or about the month of July, 1949, under and pursuant to the provisions of paragraph G of Section VI of Exhibit "E", Plaintiff and Defendant adopted certain writings prepared by Defendant as instructions to its accounting departments on interpretations of the contract set forth as Exhibit "E", as expressing and constituting the meaning, intent and purpose of the obligations of the Defendant to pay salaries as set forth in Section VI of said Exhibit "E"; and by such adoption, the detailed provisions of said certain writings insofar as they express the circumstances under which Defendant is obligated to pay salaries, effectively became an integral part of said provisions of Section VI of Exhibit "E". A true and correct copy of said certain writings are attached hereto, made a part hereof by reference thereto, and marked Exhibit "F".

17. By reason and virtue of the entering into of the contract set forth in Exhibit "A" on or about November 1, 1950, and by reason and virtue of the provisions of paragraph H of Section VI thereof, by and between Plaintiff and Defendant, the said parties adopted and incorporated as a necessary and integral part of said contract, all applicable and pertinent interpretations of the contract [fol. 7] set forth in Exhibit "E", including the interpretations covered by said Exhibit "F".

18. On and after about November 1, 1950, and continuing to at least after the month of April, 1951, said Exhibit

"F" continued in effect and in constant use and operation by and between Plaintiff and Defendant, to define the meaning, intent, purpose, and obligation of the Defendant under Section VI of said Exhibit "A".

19. The provisions of the contract set forth in Exhibits "A", "B" and "C", as said provisions are interpreted in Exhibits "D" and "F", were in full force and effect by and between Plaintiff and Defendant, before, on and after April 3, 1951, and their provisions obligate the Defendant to pay all of the employees in the units set forth in paragraph 6 hereof, their full monthly salary without deduction for absence of one day's duration, unless such day's absence was due to furlough, or leave of absence.

20. None of the employees set forth in paragraph 6 hereof had been furloughed by the Defendant, and none were on leave of absence, on April 3, 1951, or at any other time during the month of April, 1951.

21. On April 30, 1951 and at all times thereafter, Defendant failed and refused to pay to a large number, to wit, estimated to be not less than Four Thousand (4000) of the employees set forth in paragraph 6 hereof, their full monthly salaries, having deducted therefrom a proportionate amount attributable to absence from work on April 3, 1951. Plaintiff has no actual records of the exact numbers and the names of the said employees as to which Defendant failed and refused to pay as herein set forth, and which of said employees were absent because of illness or disability, and [fol. 8] pending an examination of Defendant's books and records, the amount of money unpaid is estimated to be not less than Forty-Five Thousand ($45,000.00) Dollars.

22. The failure and refusal of Defendant to pay the said not less than four thousand (4000) employees set forth in paragraph 21 hereof, their full monthly salaries, was in violation and breach of the provisions of the contract set forth in Exhibits "A", "B" and "C" as said provisions are interpreted in Exhibits "D" and "F", and particularly in violation and breach of Defendant's obligations set forth in paragraphs 12, 13 and 19 hereof.

23. Plaintiff has exhausted the provisions of the grievance procedure set forth in Exhibit "A".

Wherefore, Plaintiff prays that your Honorable Court enter judgment against Defendant and in favor of Plaintiff interpreting the aforesaid contract and declaring the rights of the parties thereunder to be as set forth hereinabove; and to compel the Defendant to make an Accounting setting forth the individual names and amounts of unpaid salaries as set forth hereinabove; and to enter judgment against the Defendant and in favor of the individual employees set forth in paragraph 21 hereof, for the unpaid amount of their salaries, for the month of April 1951, together with interest from April 30, 1951, costs, and a reasonable attorney's fee.

Albert C. Shapira, Attorney for Plaintiff, 1208 Law and Finance Building, Pittsburgh 19, Pa.

[fol. 9] EXHIBIT "A" TO FIRST AMENDED COMPLAINT

Agreement

Between

Westinghouse Electric Corporation

and

Federation of Westinghouse Independent Salaried Unions

Introduction

Agreement, entered into as of the 1st day of November, 1950, between Westinghouse Electric Corporation, hereinafter referred to as the "Company," and the Federation of Westinghouse Independent Salaried Unions, hereinafter referred to as the "Federation," acting for itself and on behalf of and in conjunction with its various Affiliates, hereinafter specified, which are hereinafter referred to as the "Affiliates."

Section I—Recognition

1. The Company recognizes the Federation on behalf of and in conjunction with its Affiliates for those units where the Federation or an Affiliate, respectively, through a

National Labor Relations Board certification has been lawfully designated as the exclusive bargaining agent. The units for which the Federation or its Affiliates have been certified and which are included within this Agreement are set forth in the Appendix attached hereto and made a part of this Agreement.

2. Any units composed solely of non-supervisory salary employees in the manufacturing plants or district field area of the Company for which the Federation or its Affiliates shall be lawfully certified by the National Labor Relations [fol. 10] Board as exclusive bargaining representatives, shall, upon assent in writing to this Agreement by such representative, be included in and covered by this Agreement as of the date of certification, except that either party may withhold the application of those portions of this Agreement considered inapplicable to such units by giving written notice to the other party within thirty (30) days of such representative's assent. Such matters shall be resolved by collective bargaining. Other units for which the Federation or an Affiliate shall be lawfully certified may, upon agreement of the Federation, the Affiliate and the Company, be included in and covered by this Agreement.

3. The following definition will determine supervisors excluded from the various certified bargaining units:

> "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section II—Bargaining Committee

The Federation has designated a committee of five of its representatives and the Company has designated a committee of five of its representatives, for the purpose of considering, pursuant to the provisions of this Agreement, all matters relating thereto which said representatives of the Federation and of the Company, respectively,

may deem to be Company-wide and generally applicable to the various certified collective bargaining units. Either [fol. 11] party may at any time change said representatives, provided that neither party will be represented by more than five representatives.

Section III—Cooperation

1. The Company and the Federation recognize that mutual respect and confidence will aid greatly in carrying out the provisions of this Agreement and will also go far toward bringing about the harmonious relations which both desire. The Company and the Federation further agree that collective bargaining can best succeed in a friendly atmosphere in which both parties bargain in good faith and with an honest desire to understand each other's point of view.

2. The Federation recognizes that it is the responsibility and right of the Company to maintain discipline and efficiency, and agrees that Management shall have the freedom of action necessary to discharge its responsibility for the successful operation of the Company. These responsibilities and rights of the Company do not in any way limit any other specific provision of this Agreement. The Federation and the Company agree to administer the provisions of this Agreement in good faith.

3. The Company agrees that it or its supervisors or other employees will not discriminate against any employe because of membership or activities in the Federation or the Affiliates.

4. The Federation and the Affiliates agree that neither they, their officers, their members, nor persons employed directly or indirectly by them, will discriminate against any employe. The Federation and the Affiliates agree not to solicit members, dues or funds during the working hours of employes involved.

[fol. 12] Section IV—Consideration

This Agreement evidences the understanding reached through collective bargaining between the Company and the Federation. Both parties share the belief that publica-

tion of these provisions will tend to eliminate misunderstanding and promote accord, and the Federation and the Company will work in unison to that end. The Company will, upon execution of this Agreement, or any local supplements, provide a reasonable number of copies to be made available to interested persons upon request.

Section V—Collection of Dues

1. The Company will deduct, upon written and signed employe authorizations furnished to local Management on a form approved by the Company, from the employe's pay his Affiliate dues for each month in the amount authorized, and shall promptly remit same to the Affiliate.

2. Standard dues as established by the Federation are generally $1.50 per month. Changes in present established dues by the Affiliate will be made effective only after a thirty (30) day written notice to the Company (local Management) and the presentation of new written and signed employe authorizations.

3. Deductions for employes paid monthly will be started within the month provided the authorization is received by the Company not later than the sixth working day of the month. For employes paid weekly, all authorizations received by the last Friday in the Westinghouse payroll accounting month will be included in the deductions for the following month.

4. Deductions will be made from the first pay of the month in the case of weekly payrolls and from the end of [fol. 13] the month pay in the case of monthly payrolls. If a member does not receive pay during the month, dues for that month will not be deducted by the Company from the pay in any subsequent month. Dues deductions will be automatically reinstated for employes returning to work after leave of absence or sickness, providing their authorizations remain in effect.

5. Collection of any back dues owed at the time of starting deductions for an individual will be the responsibility of the Affiliate and will not be the subject of payroll deduction unless such delinquency is a result of an error by the Company.

6. Revocation of employe authorization of payroll de-

duction may be effected by written notice by the employe to the Company at least one month prior to the desired effective date.

Section VI—Salaries

A. Salary Schedules

(1) Salaries will be paid according to a local schedule based upon the classification system in each bargaining unit. The place on the schedule of each position will be in relation to other positions in the bargaining unit and in reference to the lowest and the highest paid positions.

(2) Any employe will, unless otherwise mutually agreed upon, receive a salary rate within the established rate range and the salary paid will be based on merit.

(3) All changes for any reason in an employe's position or rate after hiring, except separation, will be effective the first of a payroll period. The Affiliate will [fol. 14] be advised of any change in the classification of an employe's position before the individual is notified. When the Affiliate representatives question the proposed change the change will not be made effective for at least two working days, to allow a period for further study and discussion. The classification may then be made effective and a grievance may be filed.

B. Position Description and Evaluation

(1) The Federation agrees that the preparation of position descriptions and evaluation of new or changed positions are functions of Management. However, a new or an existing description and/or evaluation will be reviewed at any time upon request by the Affiliate.

(2) The Affiliate president will be presented with new position descriptions and their evaluation before they are made effective. The Affiliate president will be notified at least fifteen (15) days before changed descriptions and/or re-evaluation of existing positions become effective. Questions on the description or evaluation of a new or changed position which cannot

be resolved before the changes become effective may be processed as grievances under the grievance procedure.

7. Group Leader Remuneration

(1) A group leader is a non-supervisory employe who is a working member of a group, without disciplinary authority, who works under a minimum of supervision, who regularly leads, instructs, and guides employes in the group, and who generally allocates the work.

(2) The formation, division, or discontinuance of groups and the selection of a group leader will be determined by local Management after discussion with the Affiliate representative.

[fol. 15] (3) In selecting group leaders, the ability to organize and direct a group will be the deciding factor, with seniority being the next consideration.

(4) Some salary positions may of necessity include a minor amount of work which may normally be recognized as group leading where groups are not considered necessary.

(5) When an employe is assigned the duties of a group leader by local Management, he will be paid in accordance with the schedule set forth in paragraph (6). Any questions concerning the payment of employee for such duties may be made the subject of a grievance.

(6) Group leaders' remuneration depends on the base rate of the group leader and the size of the group. No group of more than twenty (20) exclusive of the leader will be formed. Additional compensation for group leaders will be based on the following schedule:

Schedule

Size of Group, exclusive of the leader	Addition to Base Rate
2 to 5	5%
6 to 10	7.5%
11 to 20	10%

(7) When the size of a group is increased or decreased for a period of more than three (3) months, it will be presumed that there has been a change in the group's usual or normal size sufficient to effect a change in the addition to base rate for group leading, and the rate of additional payments shall be changed in accordance with the schedule. The effective date of the change in group leader remuneration shall be the beginning of the payroll period following the end of such three (3) months period.

[fol. 16] (8) When a group is formed, divided, or discontinued the effective date of the change in group leader remuneration shall be the beginning of the payroll period following the change.

D. Salary Re-Rates

(1) Salary rate increases are based on merit, including the employe's capacity to handle the range of work of his position classification, his quality and quantity of work, cooperativeness and reliability and experience. Any merit increase will be of such amount as to make his rate commensurate with his performance as related to these factors.

(2) Salaried employes whose work is satisfactory will receive not less than 10% above the minimum of the rate range not later than the first of the seventh month after employment. An employe transferred to a higher class position, whose work performance justifies it, will receive, not later than the first of the seventh month after transfer, an increase to at least 10% above the minimum rate of the new position. An employe whose rate before transfer is above the minimum of the new classification and whose work performance justifies it will receive a merit increase within the rate range not later than the first of the seventh month after transfer. When an employe is upgraded to a higher position in the same occupation performing similar work in the same department consideration will be given for an increase at the time of upgrading if the employe's capacity to handle the range of work of this new position classification, his quality and quan-

tity of work, cooperativeness and reliability and experience merit the increase.

[fol. 17] E. Night Turn Bonus

Employes working night turn will receive an extra compensation of 10% of their earnings on night turn, when the regular quitting time is after nine o'clock in the evening (9:00 P. M.) and up to and including nine o'clock (9:00 A. M.) of the following day.

F. Reporting for Work

Employes who report to work at Management's request on regular furlough days and at times not regularly scheduled will be granted a minimum of four (4) hours of work or equivalent pay, subject to details in local supplements. If the employe has qualified for overtime in accordance with the overtime provisions of this Agreement, extra remuneration as provided in Section X—Overtime—will be paid for hours not worked.

Note: The foregoing provisions will not apply in the case of an emergency such as fire, flood, power failure, or work stoppage by employes in the plant.

G. Salary Reviews

(1) The salary review is an inspection of salary rates to establish the proper fulfillment of the provisions of paragraph D of this Section and to determine that salary rates are currently consistent among employes in a given position in relation to their quality and quantity of work, cooperativeness, reliability and experience.

(2) The effective date of any rate adjustments agreed upon at the rate review will be scheduled for the first of the month following the period scheduled for the unit rate review.

(3) Salary reviews will be held semi-annually unless, due to existing circumstances, it is thought advisable [fol. 18] by the Affiliate and local Management either to change or omit the schedule review. Since rate

schedules are based on work performed, Management should give thought to the correctness of the employe's classification when preparing the review sheets. The procedure for such reviews is as follows:

(a) At least four copies of the review sheets prepared as of the month preceding the review, will be completed by the first of the month in which the review is scheduled and a copy will be given to the locally designated Affiliate representative.

(b) Employes within a basic unit or sub-division thereof are to be listed by position, and then in alphabetical order within a position group. The position name, number and rate range will be entered on the sheet, above the names of employes in a given position.

(c) Sufficient information should be entered in the "remarks" column to explain any special cases or conditions.

(d) Not more than three representatives of the Affiliate will review the sheets with Management's representatives. An officer or representative of the Federation may attend the review.

(e) All recommendations agreed upon at the review, including the new base rate and the effective date, will be entered on the review sheets before completion of the review.

(f) A list of the cases arising during the review, on which further consideration is desired, will be made up by Management. This list, after further consideration, will be discussed by the group making the review. If necessary, any special cases on which [fol. 19] a decision cannot be reached will be submitted to the Negotiating Committee of the Affiliate for discussion with local Management. If any of these cases are not resolved by the parties, the individual's case may be made the subject of an appeal grievance.

(g) The review sheets are to be numbered consecutively and the district representative, or an officer of the Affiliate, and the Management representative,

will sign the original of each sheet, indicating that the review of the sheet is completed.

(h) The original or Master copy of the review sheets is to be sent to the Industrial Relations Department when the review is completed. In District office locations, Management's copy is to be retained by the District Manager.

H. Information

(1) Information to the Federation and Affiliate

That portion of Company instructions contained in the Company's Industrial Relations and Accounting Manuals (Part 6) which covers (a) government orders and laws affecting employes and dealing with wages, hours, and working conditions, and government interpretations of such orders and laws, or (b) instructions or interpretations of this Agreement, will, upon issuance by the Company, be sent to the Affiliates and the Federation.

(2) Information to the Affiliate

Local Management shall furnish the Affiliate involved with (a) copies of all general interpretations by local Management of the information furnished under Paragraph (1) above, and (b) general interpretations of local supplements. The Affiliate will be furnished, periodically, with lists of employes transfered, hired, [fol. 20] rehired, and released. The Affiliate will be advised by local Managements as to the names of their authorized representatives for the administration of this Agreement.

(3) Information to local Management

Local Managements of the Company are to be kept advised by the Affiliate as to the names of their authorized representatives.

(4) Information to Employes

Information will be given an employe concerning his employment status at time of employment, upon

change in position, change in rate, transfer between departments and granting of a leave of absence. Notification of change in employment status will be prepared at the same time the supervisor initiates the Authorization for Change in Salary and Employment Rolls, and will be given to the employee not later than the end of the pay period in which the change is made.

Section VII—Hours of Work

1. The standard basic work week is forty (40) hours based on eight (8) hours per day, five (5) days per week, Monday to Friday inclusive. An employe's work day is the twenty-four hour period beginning with his regularly assigned starting time of his work shift, and his day of rest starts at the same time on the day or days he is not scheduled to work. His work week starts with his regularly assigned work period on Monday.

2. Local conditions may make desirable a basic work week different from the standard basic work week for all or a portion of the employes. Such variations will be a matter for local negotiations. Unusual situations may re- [fol. 21] quire modification of the established work schedules in the different units which may warrant special wage payment provisions which will be negotiated locally. The schedules of hours for the established shifts in the bargaining units are contained in the local supplements.

3. Different methods of attendance control are employed throughout the Company. The method used is determined by local situations and is designed to control local problems and is a subject for local collective bargaining.

4. In computing hours worked on late arrivals, early departures and for overtime in connection with attendance control, an employe will be credited with time worked from the start of the one-tenth hour interval in which the recorded starting time falls, and to the end of the one-tenth hour interval which the recorded time of departure falls. Where starting or stopping times are shown on the pass, entrance before and exit after the indicated time will not be credited. Elapsed hours will be computed in terms of hours and tenths of hours.

Section VIII—Leave of Absence

1. The term "Leave of Absence" applies to a continuous period of thirty (30) days or more away from work without pay where the intent is to reinstate the employe at the expiration of the leave, subject to the prevailing conditions at that time, his return to work within the period of the leave of absence, and qualification under the usual employment standards including a physical examination. Seniority credit will be given for periods covered by a leave of absence.

2. An employe may request a physical examination before taking such leave of absence. Physical defects will be recorded and brought to the attention of the employe. [fol. 22]' Physical defects, so recorded, will be given consideration by the Medical Department in determination of medical standards for returning to work at the end of the leave of absence period.

3. The request for a leave of absence will be considered on the basis of production requirements, a satisfactory performance record, the reason for the request, and the length of service of the employe.

4 Where a request for leave of absence is made for a period of more than three months, the leave will be granted for ninety days and consideration may be given to an extension at the termination of the ninety day period. In no case will the total period exceed twelve months, except as outlined below.

5. Upon written request of the Affiliate or the Federation, an employe elected to an office of the Federation or the Affiliate will be granted the usual leave of absence, without losing seniority, not to exceed one year, unless an extension is granted. The determination as to whether such an extension will be granted will be reached through collective bargaining between the Federation and the Affiliate and Management, but in no case shall such leave or leaves of absence or any extension thereof total more than three (3) years. Such an employe, returning to his former position, will receive a rate commensurate with his rate immediately prior to his leave of absence.

Section IX—Seniority

1. Probation Period

A. A new employe shall be on a probation period until he has completed six months of satisfactory employment.

[fol. 23] B. The employe shall be considered on trial during this period.

C. Upon completion of the probation the employe will receive service credit for the probation period.

D. Employes during this probation period will not be eligible for upgrading or transfer except by agreement between the supervisor and the Affiliate representative.

2. Seniority Credit

A. Seniority credit for employes will be established in local supplements.

B. An employe on leave of absence is not on the active roll, but will accumulate service during leave of absence. An employe on furlough is on the active roll and will accumulate service while on furlough. An employe laid off is not on the active roll, will not accumulate service while laid off, and is for all purposes considered as separated from the employ of the Company, but will have the right to be placed on the Inactive Seniority List and such other rights as are provided in this section.

C. An effective service date for each employe will be established at the time of his reemployment or transfer to the bargaining unit. Credit will be granted for previous service as prescribed in Paragraphs A and B of this sub-section 2 in establishing the effective service date for the employe.

3. Inactive Seniority List

A. The names of those laid off, except employes laid off during their probation period, will be placed on the Inactive Seniority List.

[fol. 24] B. The names of employes who voluntarily

quit, who are released, or who are discharged for cause will not be placed on the Inactive Seniority List.

C. When a job is available for a former employe on the Inactive Seniority List, he will be notified as established in local supplements and the position will be held open for five working days from the date of mailing of the notice. If the employe does not report within the five day period his name will be removed from the Inactive Seniority List. If however, within a further ten working day period the employe reports and submits satisfactory evidence that he was unable to report during the five day period, his name will be returned to the Inactive Seniority List and he will be notified when work is again available. Where the person to be rehired is employed by another employer at the time he reports, arrangements will be made whereever possible to permit sufficient time to give necessary notification to such other employer.

D. Former employes will have their names removed from the Inactive Seniority List:

(1) When he has been on the inactive list for a period longer than shown in the following table:

Service less than 3 years—1 year
3 years but less than 5 years—2 years
5 years but less than 8 years—3 years
8 years but less than 10 years—4 years
10 years and over—5 years

(2) When he refuses to accept a job of the same or higher salary level as the job held at the time of his lay-off and which he is able to perform with only such training as an employe with previous satisfactory experience on such job would require.

[fol. 25] 4. Return of Employes to Bargaining Unit

A. An employe who left a position which is within the bargaining unit, or a position which, if presently existing, would be within the bargaining unit, will be returned to the bargaining unit with the same seniority

credit as when transferred out, plus credit for the period of Company service out of the bargaining unit.

B. The provision in the above paragraph will not apply to non-supervisory employes returning from bargaining units represented by other bargaining agents unless such other bargaining agents have agreed to accord corresponding treatment to employes returning to work in such units.

C. An employe returning from leave of absence, disability, or from a position outside the bargaining unit will be placed by agreement with the Affiliate or will replace the least senior employe in his former position in the same seniority unit, unless such position no longer exists or is held by a more senior employe. In either of such events, the returning employe will be placed in a position under the local reduction in force procedure as if he had been replaced in his former position.

5. Seniority Units

A. The composition of seniority units, which may consist of the certified bargaining unit or a sub-division thereof, shall be negotiated locally and shall be described in local supplements.

B. Seniority for purposes of an increase or decrease in force will be considered equal if employes in question have effective service dates within a thirty (30) [fol. 26] day period. In plants where the effective service dates of a considerable number of employes are concentrated within short periods this provision may be modified by local supplement.

6. Increase in Working Force Procedure—Upgrading and Transfer

A. Within procedures established locally, upgrading will be made on the basis of the effective service date of the employe if the employe's occupational experience, education, and suitability indicate he can acceptably do the job.

B. Positions in lower classified salary levels (not requiring occupational skills) will be filled on the basis

of effective service date with the department or seniority unit as determined locally.

C. Positions in other classifications not covered in paragraph B above will be filled (1) from satisfactory employes who formerly held the specific positions in the department and as a result of a recent reduction in activity have been downgraded, transferred to other work in the unit, or are currently on the Inactive Seniority List; or (2) satisfactory employes will be upgraded within their occupations. Local procedure will be established to provide an opportunity for transfer of satisfactory employes to positions for which they are qualified by occupational experience, education, and suitability.

D. Employes will not normally be considered for upgrading or transfer to a position other than within their occupation in their department within a period of six months following hiring, rehiring, transfer at their request or upgrading.

[fol. 27] E. Additional employes will then be hired or transferred from outside the bargaining unit. Such additional employes will not be hired or transferred into the bargaining unit while former employes, willing to take the job, rema-n on the Inactive Seniority List unless they have superior qualifications to employes remaining on the Inactive Seniority List.

7. Decrease in Working Force Procedures

A. Employes will be permitted, in local reduction in force procedures, to displace other employes only if the employe is considered to be able to satisfactorily perform the work with only such training as an employe with previous experience on such work would require.

B. Differentials in effective service dates required before one employe may replace another under varying conditions will be established in local reduction in force procedures. Such procedures will keep replacements and transfers to a reasonable minimum consistent with the efficient operation of the Company.

8. Notice Periods

A. Employes laid off because of lack of work shall receive the following advance notification:

(1) Over one year of service—2 weeks
(2) Less than one year of service—1 week

B. Employes released shall receive the following advance notification:

(1) Over one year of service—2 weeks
(2) Less than one year of service—without notice

C. Employes discharged for cause need not be given advance notice.

[fol. 28] D. In the event of a layoff or release, the Affiliate representative shall be notified before notice is given to the employe. In the case of discharge, the Affiliate representative will be notified with the reasons therefor within one working day after the incident causing the discharge.

9. Furloughs

When furloughing of employes becomes necessary, the local representatives will receive such reasonable advance notice as is practicable under the circumstances. Furloughs are of three (3) types:

(a) Regular Furloughs are a number of days off per week or per month without pay given employes as a part of the program of sharing work in lieu of a reduction in force. Temporary reductions in activity are bridged through furloughs. When there is other than a temporary reduction in activity employes will be laid off to maintain a full work week. When employes with long service are being laid off the parties may locally negotiate a temporary modification of this procedure, including the use of furloughs, and the period such modification is to apply.

(b) Emergency Furloughs are periods off without pay resulting from material shortages, power failures, labor disturbances or other conditions where transfer of employes to provide work is not feasible. When

such conditions are anticipated, the subject will be discussed with the Affiliate Negotiating Committee.

(c) Disciplinary Furloughs are time off without pay as a punishment for misconduct of an employe.

10. Graduate Students and Trainees

It is recognized that practical work experience is necessary for the proper training of Graduate Students. Work [fol. 29] assignments, not to exceed six weeks each, may be made with the understanding that other employes will not be laid off or furloughed as a result of such assignments. Graduate Students will not be considered in the bargaining unit during their training period. Provisions covering other trainees will be contained in local supplements.

11. Seniority Preference

A. At the written request of the Affiliate during their term of office, (1) Federation Officers, (2) Affiliate Officers, (3) Affiliate District Representatives, and (4)Affiliate Group Representatives will be given seniority preference sufficient for them to retain a position in their occupation or line of promotion in their particular unit of representation. The bargaining unit will be considered as the unit of representation of Federation and Affiliate officers. Where more than one officer or representative may be affected in the same reduction in activity and their units of representation overlap, consideration shall be given in the order they are listed in the first sentence above. The written request of the Affiliate will establish the order of ranking of the Officers of the Affiliate. Officers and representatives must be qualified in accordance with the reduction in force procedure for any position to which they are transferred under this provision.

B. A group of employes, not to exceed 5% of the current number of employes on the most recent rate review sheets or two (2) employes, whichever is greater, in the bargaining unit receiving a salary of $250.00 a month ($58.75 a week) or more, will be given seniority preference as set forth below because of outstanding abilities in certain work or because of

[fol. 30] unusual ability for training purposes to fill positions either in the plants or in field locations.

1. Employes having outstanding abilities in certain work and employes selected because of unusual ability for training purposes to be listed must receive a salary of not less than $250.00 a month ($58.75 a week).

2. The Affiliate will be given a list of the employes to receive seniority preference and such list will be kept up-to-date by local Management. The list will include for outstanding employes the present position number, and for trainees the position for which the employe is to be trained. The list of employes in a given department of a division (engineering, accounting, manufacturing, etc.) or any other unit as may be negotiated locally will not exceed 10% of the employes or two (2), whichever is greater in the department or unit. The lists of employes, and any changes therein, will be discussed with the Affiliate before being made effective and other essential information will be supplied. Objections may be presented through the grievance procedure.

3. Employes on this list may be upgraded or transferred to an open position for the purpose of specialized training or because of outstanding abilities in certain work.

4. An employe on the seniority preference list will be given seniority preference at the time of a reduction in activity sufficient to enable him to retain his position so long as such work remains, but when the work no longer remains he will be given preference for another related position in the same salary level or successively lower levels if he has training [fol. 31] for such a position. In such instance the ability, the purpose for which he is being retained or trained and the relative length of service of the employe on the list, will be considered before a decision is reached that he replace a long-service employe.

5. If the name of any employe being trained is removed from the seniority preference list because

seniority preference is no longer required, the employe will be placed in accordance with local seniority procedures. When an open job exists under these circumstances it will be filled in accordance with all applicable seniority provisions. However, the names of employes who have been trained and are on the position for which they have been trained may be removed from the seniority preference list, and they shall remain on their job thereafter with the same seniority status as though they had never been on such list. The names of outstanding employes upgraded or transferred to open positions may be similarly removed from the seniority preference list after they have been on such list for one year.

6. The monthly and weekly salaries referred to in this Paragraph B are on the basis of a 40 hour weekly schedule—proportionately lower figures will apply where the weekly schedule is less than 40 hours.

C. Questions of conflict between seniority preference granted in Paragraph A and Paragraph B will be resolved by agreement between the Affiliate and local Management.

D. Employes working on special assignments of limited time duration that would be materially affected by a replacement and employes performing specialized work may be temporarily retained on their job [fol. 32] until the assignment is completed or through training or other means an adequate replacement can be made. These situations are to be negotiated locally.

Section X—Miscellaneous Procedures

1. Jury Duty

Salaried employes will be paid their regular salary while on jury duty but will be expected to report for their regular duties when temporarily excused from attendance at court. No salary will be paid during furloughs or days that would have been furloughs while on jury duty.

2. Security Regulations

The Company has certain obligations in its contracts covering government work which pertain to security. Therefore, if any government agency concerned with the Company's security regulations advises the Company that any employe of the Company covered by this Agreement is restricted from work on or access to classified information or material, the Federation or its Affiliates will not, after having seen the order, present or prosecute a grievance because the Company restricts such employe from such work or from access to classified information or material, but shall not be precluded from prosecuting a grievance concerning any action of the Company which exceeds security requirements.

3. Military Service

Employes drafted or called into military service will be granted a military leave of absence. The leave of absence will cover the period of such required military service and will be considered as continuous employment.
[fol. 33] The employe must apply for re-employment within ninety days from the date of honorable discharge (or the termination of the required period of military service). An employe so applying will be reinstated in his former position or a position in the bargaining unit which he left on the basis of his seniority, under the provisions of this Agreement, providing the employe complies with the following conditions:

a. Application for reinstatement is made within the time period provided above.
b. Official discharge papers are presente .

Employes reporting, as provided for in the above provision, who are not qualified to perform the duties of their former position will be given special consideration, and local Management will endeavor to place them on suitable jobs.

An employe so reinstated will be entitled to participate in insurance and other benefits on the same basis as other employes returning from leave of absence.

Section XI—Overtime

Non-exempt Employes

1. Hours worked by non-exempt employes, except hours worked on Sunday, in excess of 8 hours in any day or 40 hours per week, will be paid at an overtime rate of one and one-half times the employe's average earned hourly rate.

2. Absent hours considered as involuntary will be considered as hours worked for determining overtime. Involuntary absences are defined as follows:

a. Funeral or death in the immediate family (includes relatives living in the same household with the employe, or mother, father, brother, sister, or child, who are not of the same household).

[fol. 34] b. Jury duty.

c. Injury or illness of the employe.

d. Furloughs for which deduction from pay is made except in case of disciplinary furlough.

e. Holidays and vacation days.

f. Union activities by elected representatives as contemplated in this agreement.

3. Hours worked by non-exempt employes on Sunday after forty straight-time hours (including involuntary absences) have been worked in the week will be paid at an overtime rate of twice the employe's average earned hourly rate.

4. Hours worked on holidays by non-exempt employes will be paid at an overtime rate of one and one-half times the employe's average earned hourly rate. Such payment is in addition to the employe's salary if the holiday falls within the work week. Monday to Friday inclusive. No salaried payment is made to employes for holidays falling on Saturdays not worked.

5. The above provisions apply to the standard basic work week. Special conditions may require exceptions and local overtime provisions to cover such exceptions. These questions are a subject for local negotiations.

6. The earned rate for overtime purposes will consist of straight-time earnings, including base rate,

night turn bonus, group leader remuneration, and incentive payments.

Exempt Employes

1. Administrative and professional employes, exempt under the Fair Labors Standards Act, will, when agreed upon locally, be issued exempt passes.

2. Overtime hours of exempt employes in District [fol. 35] Field areas will be paid on the basis of scheduled hours as provided in a supplement hereto.

3. Employes who are issued exempt passes shall be paid for extra hours only when scheduled by the supervisor. Incidental overtime worked shall be regarded as casual and a part of the job requirement and not subject to inclusion in schedules. Scheduled overtime will approximate overtime requested or approved by the responsible supervisor. Schedules will be prepared on a monthly basis, in advance, and expressed in terms of equivalent weekly hours. As a general policy schedules requiring Sunday and holiday work should be avoided.

4. Vacation payment will be limited to the basic work week.

5. Payment for scheduled overtime will be in accordance with the following schedules:

Base Salary Rates for 40 Hours	Pay for Scheduled Overtime Over 40 Hours per Week
Up to and including $400.00 per month ($92 per week)	Time and one-half
Over $400 per month (over $92 per week)	$15.00 per scheduled hour ($3.50 per scheduled hour for weekly paid employes) with a maximum payment of $750.00 per month ($173 per week) less 10c for each $1.00 of base rate under $750 per month ($173 per week).

[fol. 36] Section XII—Holidays

1. Holidays observed by the Company will be New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas. When the necessary arrangements can be made and it is satisfactory to the Affiliate and local Management, another day may be permanently substituted for Washington's Birthday through a provision in the local supplement.

2. When a holiday falls on Sunday, it will be observed the following Monday. Basic hours on a holiday will be credited as time worked for salaried employes, when the holiday is observed within the basic work week of the individual.

Section XIII—Vacations

1. The vacation periods of employes will be arranged so that they do not unreasonably interfere with the operation of the plant or office. Insofar as practical, the employe will be permitted to take a period satisfactory to him. Where more employes in the same position desire the same vacation period than can be permitted to be absent, preference will be based on service credit.

2. Certain plants or offices will shut down each year for vacation purposes, and the time of the year for shutdown will be a matter for local negotiations. In these locations the vacation will run concurrently with the shutdown period. Employes who become eligible for vacations subsequent to the annual shutdown, but before the end of the year, will be granted vacation pay when they become eligible, if they were absent during the shut-down period, without additional time-off for vacation. It is recognized that some employes will be requested to work during the shut-down period.

[fol. 37] 3. Salaried employes will be granted vacations as follows:

A. Over one (1) year of total employment but less than twenty (20) years with three (3) months continuous employment immediately preceding the time of starting vacation—2 weeks.

B. Over twenty (20) years total employment with three (3) months continuous employment immediately preceding the time of starting vacation—3 weeks.

4. Salaried employes working on an incentive basis will be paid vacations at their current base rate plus the average weekly incentive bonus for the preceding calendar quarter.

5. In the case of a salary employe where the one year of service immediately preceding the vacation period is a combination of hourly and salary and includes at least three months on the salary roll (not necessarily continuous), the vacation will be the same as for all other qualified salary employes. An employe will be entitled to vacation for which he would have been entitled as an hourly paid employe up to the time he has completed 3 months of service on the salary roll. If not qualified for vacation at the time of transfer, he will be entitled to a vacation on hourly basis if he qualifies before completion of 3 months of service on salary, and after completing his three months of service he will qualify for any difference between salary and hourly paid vacation hours providing the 3 months are completed on or before December 31 of the year in which the transfer occurs.

6. When an established holiday or its observance falls on a normal week day within the vacation period of a salary employe, an additional vacation day will be granted.

[fol. 38] 7. It is the responsibility of Management to see that all employes take their alloted vacations.

8. When an employe is removed from the active payroll for any reason, except disciplinary discharge, payment for vacation not taken for the current year will be made if the employe has qualified for vacation.

Section XIV—Bulletin Boards

The Company will permit the use of bulletin boards for the purpose of posting Federation and Affiliate notices or other information of interest to Federation members. All such notices will be subject to the Management's approval and arrangements made by local Management for posting.

Section XV—Settlement of Disputes

1. Responsibility

A. During the life of this Agreement, the Federation and the Affiliates, except, however, as provided in Paragraph B of this section, will not cause, or sanction their members to cause or take part in, any strike (including sit-downs, stay-ins, slow-downs, or any other stoppage of work which restricts or interferes with production), nor will the Company lock out any employe. It is the intention of this Agreement, with the single exception provided in Paragraph B of this Section, to prohibit all lock outs by the Company and all strikes; and, without limiting the generality of the foregoing, to prohibit strikes in connection with demands for contractual additions or changes or for general salary increases, either locally or Company-wide. The Federation agrees that, upon receipt of notice that a strike (as defined above) in violation of this Agree- [fol. 39] ment is in progress, or is about to begin, it will immediately take all appropriate steps to terminate or prevent such strike.

B. The Federation or the Affiliates will not cause or officially sanction their members to cause or take part in any strike (as defined in Paragraph A) nor will the Company lock out any employes or transfer work from any location, because of a dispute which is within the proper scope of the grievance procedure provided in this Agreement or the applicable local supplement, until such times as the grievance procedure has been fully exhausted, and in the event of a strike, it is authorized by the Federation. The Federation will notify the Company at least seven (7) days before it grants authorization to the Affiliate to strike.

C. Employes taking part in any strike in violation of this Agreement will be subject to disciplinary action.

2. Grievance Procedure

A. The Company agrees to bargain with the appropriate representatives of the Affiliate or the Federa-

tion regarding rates of pay, wages, hours of employment, or other conditions of employment. Matters deemed by the Federation and the Company to be Company-wide and generally applicable to the certified bargaining units shall be subjects for negotiations between the bargaining committees of the Federation and the Company. Matters not deemed to be Company-wide and generally applicable to the various certified bargaining units and which are not grievances, as hereinafter defined, shall be subjects for negotiations between the bargaining committees of the Affiliate and local Management.

[fol. 40] B. The term grievance is defined to mean (a) any dispute as to the interpretation, application, or claimed violation by the Company, the Federation, or an Affiliate, of this National Agreement, its supplements or any local supplement covering the bargaining unit involved, (b) any subject that the National Agreement provides shall become a grievance, or (c) questions involving discipline, release or discharge of employes in the bargaining unit.

C. Local Grievance Procedure:

(1) It is the intention of this Agreement that local Management and the Affiliate shall make every effort to settle all grievances at the local level.

(2) The immediate Affiliate representative and the immediate supervisor will handle grievances at the first step. There will not be more than three steps in the local grievance procedure and the number of steps, the maximum number of representatives of the Affiliate at the various steps, the designation of the Management and Affiliate representatives at the second and third steps, and any other details will be included in local supplements.

(3) The Affiliate representative will present the written grievance to the designated local Management representative at each step. A meeting will be held promptly at a mutually convenient time to discuss the grievance, an answer will be given by the

Management representative following the final meeting (if more than one meeting is necessary), within a maximum of three working days at the first step, seven working days at the second step, and ten working days at the third step.

(4) The above time limits (paragraph 3) at each step may be extended by mutual agreement of the [fol. 41] Management and Affiliate representatives designated for that step of the grievance procedure. If extension is not granted and the time is exceeded, the grievance may be advanced to the next step of the procedure.

(5) The answer will be given to the designated Affiliate representative at each step. If the answer is satisfactory the Affiliate representative will so indicate on the grievance form and return one copy to the Management representative answering the grievance. If the answer is unsatisfactory the Affiliate representative will so indicate on the form, attach the reasons why he considers the answer unsatisfactory, and may forward it to the designated Management representative at the next step.

(6) Company grievances may be originated at any step of the grievance procedure and thereafter the procedure outlined in paragraphs (2), (3), (4), and (5) will apply except that the action outlined for Management representatives and Affiliate representatives will be interchanged.

D. Appeal Grievance Procedure:

(1) Should the Management and Affiliate fail to adjust a grievance arising under this Agreement or the local supplements, such grievance may be referred to the headquarters of the Company and the Federation. The Federation and the Company shall submit to each other any grievances referred to them by the Affiliate or the local Management, and during the month following the representatives of the Company and the Federation shall meet in an effort to settle such grievances that have been referred to each party and an answer will be given promptly.

[fol. 42] (2) Grievances forwarded by the Affiliate to the Federation or by local Management to the Company's headquarters for consideration as appeal grievances shall be forwarded in duplicate. Two copies of any supporting material shall accompany the grievance.

(3) If local Management's final reply to a grievance of the Affiliate is unsatisfactory, the Affiliate, after notifying local Management in writing that it does not choose to refer the grievance to the national appeal level, shall be considered as having fully exhausted the grievance procedure. The Federation, however, may choose to take such grievance to the national appeal level, in which case the Federation will so inform the Company's headquarters in writing. When an Affiliate refers a grievance to the national appeal level through the Federation or if the Federation takes such grievance to the national appeal level, the grievance procedure shall be considered as having been fully exhausted only after the Federation advises the Company that the Company's reply at the national appeal level is unsatisfactory.

E. Should the Federation and the Company fail to settle any of such grievances, then the parties may consider referring such matters to an impartial umpire or board by mutual agreement.

F. Neither party's reply to a grievance of the other party will be considered final at any level of the grievance procedure (local or appeal) and the grievance closed, if written notification to the contrary is not received within thirty (30) days of the date of such reply.

[fol. 43] Section XVI—Payment for Negotiating Time

It is agreed that negotiating time will be kept to a minimum commensurate with good practice and in the interest of efficiency. Unless of such nature as to be termed urgent, negotiating time will be scheduled by Management and the

Federation or Affiliate representatives in advance and in such manner as to least interfere with regular work schedules.

The following procedure will apply:

A. Officers and other representatives of the Affiliates and/or the Federation, whether exempt or non-exempt employes, must give notification to and secure a time report from their respective supervisors when stopping work to conduct union business, whether or not with Management (including, without limitation, investigation of complaints that may lead to grievances, handling and adjustment of grievances and attendance at meetings of Union committees) and must return the report to the supervisors when again ready to start work.

B. Payment will be made by the Company at the representative's salary rate only (whether exempt or non-exempt employe) for such time reports covering time spent in:

1. Investigation of complaints that may lead to grievances.

2. Handling and adjustment of grievances.

3. Attendance at meetings with Management within the employe's basic work week.

4. Attendance at meetings with Management outside the employe's basic work week were such attendance is not voluntary.

[fol. 44] Time covered by the above reports (sub-paragraph B) will be considered as hours worked for the purpose of determining overtime.

C. The Affiliate will reimburse the Company for all such payments except payments on time reports covering (a) meetings held in the plant during the regular working hours of the employe which are requested by Management, and (b) rate reviews. The Company may deduct amounts for which it is entitled to reimbursement from any amounts due to Affiliates, and the Affiliates will make up any deficiencies by separate payment. Time reports covering such payments will be furnished to the Affiliates.

Section XVII—Modification

1. This Agreement expresses the understanding of the parties in respect to matters deemed by them to be Company-wide and generally applicable to the various collective bargaining units, and it will not be changed, modified or varied except by a written instrument signed by duly authorized agents of the parties hereto, and any negotiations relating to proposed changes in such provisions will be carried on between representatives as outlined in Section II.

2. All agreements made locally, other than agreements as to settlement of specific grievances, shall be embodied in local supplements to this Agreement, agreed upon by the respective Affiliates and local Managements. Such local supplements shall be in writing and shall cover the procedures for administering the provisions contained in this Agreement and other items of collective bargaining not Company-wide in character and generally applicable to the various collective bargaining units.

[fol. 45] 3. The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement (except to the extent they are set forth in the Pension and Social Insurance Agreement referred to in paragraph 2 of Supplement I hereto). Therefore, except as hereinafter specifically provided in this Section XVII, the Company and the Federation, for the life of this Agreement, each voluntarily waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject deemed by the Federation and the Company to be Company-wide.

4. The Federation and local Management at each location will, immediately after the execution of this Agree-

ment, enter into or continue local negotiations for the purpose of concluding local supplements to this Agreement covering items which have been customarily included in local supplements at the respective locations. Should the Affiliate and local Management fail to reach agreement on the terms of such a local supplement after having bargained on the matter in good faith, both parties shall be free to exercise any rights they may have, with respect to the bargaining unit involved only, without regard to the limitations contained in Section XV of this Agreement.

5. The Company and the Federation agree that neither of them, nor any Affiliates, will request consideration of any proposed changes in or additions to this Agreement or any local supplement to this Agreement, including any general salary increase (either locally or Company-wide) [fol. 46] before July 1, 1951, except that the Federation may reopen this Agreement once for the limited purpose of requesting in writing, at any time between April 1, 1951 and April 30, 1951, inclusive, a general increase in salaries of all employes covered by this Agreement. The term "general increase in salaries" means only a general increase to all employes in terms of cents per hour or a percentage of pay, and shall not be deemed to include any other change, addition or increase in economic benefits to employes of any other nature whatsoever. It is further agreed that any contract changes or additions or salary adjustments that may be requested on or after July 1, 1951 will be made on the basis of an effective date not earlier than October 1, 1951, unless an earlier effective date is mutually agreed upon; and that any general increase in salaries pursuant to a reopening of this Agreement between April 1 and April 30, 1951 will be made on the basis of an effective date not earlier than April 1, 1951, unless an earlier effective date is mutually agreed upon. In the event that the Agreement is reopened between April 1, 1951 and April 30, 1951, as above provided, it is understood that the only subject which either party is bound to discuss, by virtue of any provision of this Agreement, is the subject of a general increase in salaries as defined above.

6. When any request is received for a change in this

Agreement or in any local supplement or for a general adjustment of salaries which is made in accordance with the foregoing provisions, a conference will take place within fifteen (15) days for the purpose of considering it.

7. If this Agreement is reopened between April 1, 1951 and April 30, 1951, as above provided, and the Company and the Union fail to reach agreement prior to May 1, 1951 with respect to the Union's request, the Union may strike [fol. 47] in support of its request without violating Section XV or any other provision of this Agreement. In the event of such strike, this Agreement shall continue in effect (subject to the provisions of Section XVIII—Termination) and neither party shall have the right to terminate this Agreement because of such strike unless it continues after the end of the first contract year, in which event either party shall thereafter have the right to terminate this Agreement (unless prior notice of termination has already been given pursuant to Section XVIII—Termination) on not less than one day's written notice to the other party.

8. If the parties do not reach agreement prior to November 1, 1951 with respect to any requested contractual changes or additions or salary adjustments submitted prior to July 1, 1951, or if the parties do not reach agreement prior to the end of any subsequent contract year, with respect to any requested contractual changes or additions or salary adjustments submitted prior to July 1 of such subsequent contract year, the Federation may strike after the beginning of the next succeeding contract year in support of any such requests made by it. Such strike shall not be a violation of Section XV or any other provision of this Agreement, but either party may, upon not less than one (1) day's written notice given to the other during such strike, thereupon terminate this Agreement and all of the supplements and local supplements hereto.

9. The foregoing procedure outlined in paragraph 8 shall also apply with respect to unresolved issues involving local supplements at the end of the first contract year or any subsequent contract year, except that the right to strike shall be limited to the bargaining unit or units involved in the dispute, and either the Company or the

Federation shall have the right to terminate this Agree-
[fol. 48] ment and all local supplements insofar as they apply to such bargaining unit or units upon giving the other party not less than three (3) days' written notice of such termination during the continuation of such strike.

Section XVIII—Termination

1. This Agreement shall remain in full force and effect for a period of one year from the effective date hereof, and thereafter from year to year (each such year is sometimes referred to herein as a "contract year"), provided that either party may terminate this Agreement at the end of the first or any succeeding contract year by giving the other party written notice of such termination at last sixty (60) days before the termination date.

2. Upon termination of this Agreement, all local supplements to this Agreement shall automatically also terminate. Any such local supplement may also be terminated by any party thereto as of midnight October 31, 1951 or midnight of October 31 of any subsequent contract year during the life of this Agreement, by giving at least sixty (60) days prior written notice to the other party or parties. In addition to the foregoing provisions for termination, which shall apply to all such local supplements, any local supplement or part thereof may also be terminated in accordance with any special termination provision that may be negotiated locally by local Management and the Local and specifically stated in such local supplement.

Section XIX—Exceptions

Exceptions to this Agreement are made with respect to the bargaining units at Hyde Park, Massachusetts, Sturtevant Division. Armistice Day shall be observed as a holiday in such units pursuant to Section XI—Holidays, in [fol. 49] place of Washington's Birthday. This exception may be made the subject of local collective bargaining.

Section XX—Approval and Assents

This Agreement is subject to approval by the Federation and the Affiliates involved; and shall not become binding

upon the Company or the Federation unless the Federation notifies the Company of such approval on or before November 15, 1950.

Westinghouse Electric Corporation, By /s/ Tom Turner, Vice President, Federation of Westinghouse Independent Salaried Unions, By /s/ Leo F. Bollens.

EXHIBIT "B" TO FIRST AMENDED COMPLAINT

Supplement I

Dated the 1st Day of November, 1950

Supplement to Agreement Dated As of the 1st Day of November, 1950

Between

Westinghouse Electric Corporation

and

Federation of Westinghouse Independent Salaried Unions

1. General Salary Increase

The Company agrees to grant a general salary increase to all salaried employes covered by this Agreement on a [fol. 50] forty (40) hour weekly schedule of $4.00 per week (in the case of employes paid weekly) and $17.35 per month (in the case of employes paid monthly), or five (5%) per cent of their regular salary rate, whichever is greater, effective as of September 18, 1950. Proportionately smaller increases will be granted to employes on a weekly schedule of less than forty (40) hours. The maximums of salaried key sheet classifications will be increased by five (5%) per cent. The minimum of salaried key sheet classifications will not be changed. All individual employe rates which are increased by five (5%) per cent, and all maximum key sheet rates, will be rounded out to the nearest one ($1.00) dollar in the case of employes paid monthly and to the nearest twenty-five (25) cents in the case of employes paid weekly.

2. All matters concerning pensions and social insurance are provided for in the Pension and Insurance Agreement entered into between the parties as of November 1, 1950.

Westinghouse Electric Corporation, By /s/ Tom Turner, Vice President, Federation of Westinghouse Independent Salaried Unions, By /s/ Leo F. Bollens.

[fol. 51] EXHIBIT "C" TO FIRST AMENDED COMPLAINT

Association of Westinghouse Salaried Employees

Salary Key Sheet No. 9

Effective September 18, 1950

Series	*Code*	*Minimum*	*10% Above Min.*	*Maximum*
1	1	140	154	186
1	2	140	154	195
1	3	147	162	206
1	4	155	171	216
1	5	164	180	230
1	6	174	191	244
1	7	185	204	259
2	1	196	216	275
2	2	209	230	293
2	3	223	245	313
2	4	238	262	333
2	5	254	279	356
3	1	272	299	380
3	2	292	321	408
3	3	313	344	438
3	4	336	370	470
3	5	362	398	506
4	1	389	428	545
4	2	416	458	583
4	3	446	491	624
4	4	477	525	668
4	5	512	563	716

This key sheet applies to a basic 40-hour week and rates are dollars per month. For shorter work schedules, all key sheet figures are to be in proportion.

[fol. 52] There are four unceded positions:

1-EY-0.0 Drafting Student $155-170-185-200
1-CY-0.0 Learner Stenographer $135
Composite Rates
2-WY-0.0 Hydrogen Gas Plant Operator $266-$373
3-WY-0.0 Power Plant Operator $305-$426

11-16-50

EXHIBIT "D" TO FIRST AMENDED COMPLAINT

Section 7

Division 7G1

Westinghouse Electric Corporation

Manual of Accounting and Industrial Relations Manual

December 1950 Part 6—Industrial Relations Policies and Accounting Procedures

Salary Extension

1. General

a. When a salaried employe is absent from work for an extended period due to sickness or disability, salary payment shall be continued for the following periods:

Less than one (1) year continuous service —*one (1) week*
One (1) or more years continuous service —*one (1) month*

b. The period for which salary payments are continued shall be construed as beginning on first regular working day on which employe is absent and shall continue for one [fol. 53] *(1) calendar week or month (whichever applies) including Saturdays, Sundays and holidays, from the date such absence begins.*

Note: In order to give effect to this change in policy on an equable basis, it shall become effective with those employed on and after December 1, 1950.

c. Upon expiration of the initial extension period, (see par. 1a), if illness or disability continues, employe shall be transferred to Disability Roll unless employe's continuous service exceeds five (5) years and further extension of salary is authorized on form 22501 (see par. 3).

2. Forms

1099 United States information return for calendar year
22501 Request for salary payment
23179 Request for remittance
23546 Authorization for change in payroll—white
W-2 Statement of federal income tax withheld on wages

3. Extended Salary Payments

a. At end of the one (1) month's period (see par. 1) employe's salary may be continued on basis of an additional month's salary for each five (5) years of continuous service prior to date disability began in accordance with par. 4.

b. Number of month's extension of salary developed by formula in par. 3a is maximum allowable in any twelve (12) month period, exclusive of first month's salary allowed after each illness within twelve (12) months from commencement date of first illness for which salary payment is made.

Example:

An employee with twenty-five (25) years' continuous service, absent on account of illness from August 1, is auto-[fol. 54] matically carried on payroll until September 1 and is thereafter eligible to have his salary extended, through use of form 22501, for five (5) additional months, or until February 1. If employe returns to work November 1, having received salary extension pay for two (2) months and is again absent due to illness before end of twelve (12) months from date of first absence (August 1), he will be carried on the payroll automatically for first month of illness and will thereafter be eligible for remaining portion (three (3) months) of his total salary extension time based on service prior to date first absence begins.

c. Compensation for night turn bonus or group leader remuneration will not be included when computing extended salary payments. Authorized weekly or monthly rate on form 23546 shall be used as basis of payment.

4. Form of Request

Quadruplicate copies of form 22501 addressed to payroll location should be initiated by employe's supervisor and approved by executive authorized in 6-2-1G1. Approved original of form 22501 should be forwarded to payroll location as authorization for payment sufficiently in advance of termination of previous salary authorization to permit clearance of request in time for normal payroll preparation. Copy indicating approval should be retained in department initiating the request, copy should be sent to local Industrial Relations representative, and copy forwarded to Chairman, Wage and Salary Administration Committee, Pittsburgh (after payment). Payroll location shall verify that length of continuous service shown on form 22501 has been computed correctly before giving effect to the authorization.

[fol. 55] 5. Period Covered by Request

a. Each request for extended payment will be limited to one (1) calendar month (including Saturdays, Sundays and holidays) from termination date of first automatic one (1) month payment. Each additional month's extension will be a separate request.

Example:

A salaried employe having twelve (12) years of service is absent due to illness beginning October 5, and his salary is continued for one (1) month or up to and including November 4. If before expiration of this time, his condition indicates he will not return to work, a request recommending payment of his salary for an additional month (through December 4) may be forwarded to proper executives for approval. If request is approved and should employe's condition indicate he will be unable to return to work by expiration of period authorized, the executive, based on circumstances involved, may approve a further extension of

salary payment through January 4. If employe has not returned to work at expiration of this third (3rd) calendar month's absence, he should be transferred to Disability Roll. See 6-2-1G1 for procedure regarding payment for partial payroll periods.

b. Employes on extended service (see 6-2-1G1) will be entitled to benefits provided by this section in accordance with their service record including time on extended service, but excluding time on retirement roll (inactive), if any.

6. Salary and Vacation Payment After Death

a. Subject to approval of local executive on form 23546, an employe's salary may be paid for a period of two (2) weeks following date of death.

[fol. 56] b. If deceased employe's period of continuous service exceeds five (5) years, local executive may approve on form 23546 an additional one (1) month base salary providing death was not preceded by an illness of more than one (1) month during which employe was carried on salary roll. Supplemental items—e. g., group leader bonus, shall not be included (see par. 3c).

c. Where deceased employe was eligible for and had not taken all or part of current year's vacation, such vacation payment shall be made in addition to payments listed in pars. 6a and 6b.

d. Date of death should be shown as date of termination of employment on form 23546. Authorization for payments listed in pars. 6a, 6b and 6c should be listed under "Remarks" on form 23546.

Example:

Employe died	3-8-1950
Vacation due	two (2) weeks
Salary extension authorized	two (2) weeks (or two (2) weeks plus one (1) month, whichever is applicable)

e. Name of person to whom such payments should be made shall also be included on form 23546 under "Remarks". Payment of salary extension to the estate of a deceased employe is not recommended. Clearance should be obtained from Wage and Salary Administration Com-

mittee for payment to other than the widow or children of decedent. Request for Committee approval should include information as to why such payment is recommended.

f. Payments listed in pars. 6a and 6b are not mandatory but are subject to discretion of local executive. Payroll [fol. 57] location shall issue form 23179 requesting check drawn on general account fund for full payment authorized or requested under "Remarks" on form 23546 (see par. 6d). Such payments are considered as gratuities and are not to be included in earnings or other payroll records. Payment shall be accompanied by letter of transmittal (similar to Exhibit "A") and copy sent to Vice President, Industrial Relations, Pittsburgh. Local Industrial Relations representative should see that this check and transmittal letter are delivered to recipient, if feasible, by personal contact at time status of benefit plans is discussed (see 6-7-12G1).

7. Payroll Taxes

a. Deduct withholding and social security taxes from salary payments (including salary extension) for period to and including date of death only. Payments made on general account fund voucher (see par. 6) are not subject to tax.

b. Payments for period after death shall not be reported on forms W-2 or 1099 nor shall any taxes be accrued for such payments.

8. Maximum Limitations

a. The above policy is considered equitable from the standpoint of the interests of both the Company and employe, and it is recommended that maximum limitations outlined above be adhered to in order that the establishment of any precedent beyond these limits may be avoided.

b. If payment in excess of maximum limitation (see par. 3) should be recommended, form 22501 should be prepared in quadruplicate by employe's supervisor, approved by executive (see par. 4) and all four copies forwarded with letter explaining circumstances, to Chairman, Wage and [fol. 58] *Salary Administration Committee for approval.*

Chairman, Wage and Salary Administration Committee will inform the interested executive of action taken and, if approved, will route copies in accordance with par. 4.

9. Workmen's Compensation

Where Workmen's Compensation payments are being received amount of salary extension payments shall be reduced by amount of compensation payment (see 6-1-3G1).

Copies to: Union Representatives (Federation, I.U.E. and U.E.)

EXHIBIT "E" TO FIRST AMENDED COMPLAINT

Agreement
between
Westinghouse Electric Corporation
and
Federation of Westinghouse Independent
Salaried Unions

Entered into April 1, 1947

Agreement, entered into this 1st day of April, 1947, between Westinghouse Electric Corporation, hereinafter referred to as the "Company", and the Federation of Westinghouse Independent Salaried Unions, hereinafter referred to as the "Federation", on behalf and in conjunction with its various Affiliates, hereinafter specified and assenting to this Agreement, hereinafter referred to as the "Affiliates".

• • •

[fol. 59] Cooperation—Section III

• • •

The Federation and the Company agree that collective bargaining can best succeed in a friendly atmosphere in which both parties bargain in good faith and with an honest desire to understand each other's point of view.

The Federation recognizes that it is the responsibility and right of the Company to maintain discipline and efficiency, and agrees that Management shall have the freedom of action necessary to discharge its responsibility for the successful operation of the Company. Such freedom of action is limited only to the extent specifically provided for in this Agreement or local supplements hereto.

* * *

Salaries—Section VI

Salaries will be paid according to a local schedule based upon the classification system in each bargaining unit. The place on the schedule of each position will be in relation to each other and in reference to the lowest and the highest paid positions. A written explanation of the local classification system followed will be furnished each Affiliate.

The following provisions are applicable to all bargaining units.

A. Position Description and Evaluation

The Union agrees that the preparation of descriptions and evaluation of new and changed positions are functions of management.

The Affiliate president will be notified of changes in position descriptions and the evaluation of new positions before [fol. 60] they are made effective. The Affiliate president will be notified at least fifteen days before the reevaluation of existing positions becomes effective and, where requested, a meeting will be held to discuss the change.

A request to review an existing description and/or evaluation may be made at any time by the Affiliate through the supervisor of the department on the regular grievance form.

a. Classifications

All salary positions are recorded in the East Pittsburgh Plan Area Salary Position Classification Manual. This establishes the position status regardless of who is placed on the pos-tion.

b. Composite Rates

Where continuous operation is required, certain positions are established for a swing or rotating shift and the rates established for these positions contemplate the requirements that the employes work on Holidays, Saturdays, or Sundays which occur in his established schedule, and work night turn when his schedule so requires. Employes with such composite rates will not receive the following:

1. Extra payment for working on a Holiday.
2. Credit for Holiday not worked toward overtime compensation.
3. Extra vacation day when Holiday falls within the scheduled vacation period.
4. Night turn bonus.

Should such a position be used as a single shift position, a multiplier of .937 should be used to change the composite rate to a regular shift rate.

[fol. 61] B. Group Leader Definition and Remuneration

Definition—A group leader is a non-supervisory employe who is a working member of a group, without disciplinary authority, who works under a minimum of supervision, who regularly leads, instructs, and guides employes in the group, and who generally allocates the work.

Remuneration—Additional compensation for group leaders when group leading is not contained in the job description will be based on the following provisions and schedule.

Appropriate groups for salary employes based on securing better operations will be determined locally by Management and will be a subject for negotiation before they are established. It is understood that employes may work as a group without payment of a group leader when group leaders' duties are not assigned. Duties of a group leader will not be assigned to an employe where less than three (3) employes are involved. No group of more than twenty (20) employes, exclusive of the leader, will be formed.

Schedule

Size of Group, exclusive of the leader	Addition to Base Rate
2 to 5	5%
6 to 10	7.5%
11 to 20	10%

Payment of group leader remuneration will be for full payroll periods starting with the first of the month after assignment of group leader duties and ending the first of the month following the discontinuance of the group leader activity. To avoid changes in group leader remuneration due [fol. 62] *to temporary changes in personnel, changes in the number of persons in the group will not be reflected in change in remuneration until a three month period has elapsed indicating that the change is permanent.*

C. Salary Re-Rates

1. Employees hired, whose work is satisfactory, will receive not later than six months (as determined below) after employment an increase of at least 10% above their hiring rate, provided the new rate does not exceed the maximum rate for the position.

2. Employes promoted to a position in a higher rate range, whose work is satisfactory, will receive not later than six months (as determined below) after promotion an increase of at least 10% above the minimum rate of the new position or the employe's rate before promotion, whichever is greater, provided the new rate does not exceed the maximum rate established for the position. Where the employe is known to be qualified and the transfer is to another position in a higher rate range in the same occupational line of work in the department, the increase will be granted at the time of transfer.

Employes hired or promoted between the 1st and 15th of the month, inclusive, will be given credit for that month, and those hired or promoted between the 16th and the end of the month will receive no credit for that month.

Time not worked will not be included in computing the six month period for salary rerate provision. Less than a half month will not be deducted but more than a half month will count as a full month not worked.

[fol. 63] D. Night Turn Bonus

Employes working night turn will receive an extra compensation of 10% of their earnings on night turn, when the regular quitting time is after nine o'clock in the evening (9:00 P. M.) and up to the including nine o'clock (9:00 A. M.) of the following day.

1. Night turn bonus will not be paid to employes working on duty turn shifts for hours subject to special bonus provisions.

2. Additional compensation for night turn will be considered as a bonus and will not appear as part of the base salary.

3. Non-exempt and Administrative or Professional employes will be paid night turn bonus based on weekly time slips. The bonus, in cents per hour, will be ten per cent of the salary hourly rate to the nearest tenth of a cent.

4. Exempt employes authorized for payment of night turn bonus will be made by the Division Manager in the form of a monthly list. The period of night turn assignment will correspond to payroll periods. Bonus payment will be ten per cent of the monthly salary to the nearest even cent.

E. Reporting for Work

Employees who report to work at Management's request on regular furlough days and at times not regularly scheduled will be granted a minimum of four (4) hours of work or equivalent pay, subject to details in local supplements. If the employe has qualified for overtime in accordance with the overtime provisions of this Agreement, extra remuneration as provided in Section X—Overtime—will be paid for hours not worked.

[fol. 64] Note: The foregoing provisions will not apply

in the case of an emergency such as fire, flood, power failure, or work stoppage by employes in the plant.

An employe who is requested to report for work but, who does not choose to remain for a period to qualify, or perform the work assigned will be paid only for the actual time worked.

F. Salary Reviews

Salary rate increases are based on merit and recognize improvement since the last re-rate by the employe in his capacity to handle the range of work of his position classification, his quality and quantity of work, and his cooperativeness and reliability. If the amount of improvement warrants an increase of 10%, an increase in rate of approximately that amount will be given, but not to exceed the maximum of the position range.

The salary review is an inspection of salary rates to establish the proper fulfillment of agreements and to determine that salary rates are currently consistent among employes in a given position in relation to productivity, quality of work performed, and experience. The effective date of any rate adjustments may be scheduled the first of the month following the period scheduled for the unit rate review or the first of either of the two succeeding months.

Salary reviews will be held semi-annually unless, due to existing circumstances, it is thought advisable by the Affiliate and Management either to change or omit the scheduled review. The procedure for such reviews is as follows:

1. At least four copies of the review sheets (Form 21985) will be prepared as of the month preceding the review, will be completed by the first of the month scheduled for the review and a copy will be given to [fol. 65] the locally designated Affiliate representative.

2. Employes within a basic unit or subdivision thereof are to be listed by position, and then in alphabetical order within a position group. The position name, number and rate range will be entered on the sheet, above the names of employes in a given position.

3. Sufficient information should be entered in the "remark" column to explain any special cases or conditions.

4. The district and group representative and an officer or member of the Negotiating Committee of the Affiliate will review the sheets with Management's representatives. An officer or representative of the Federation may attend the review.

5. All recommendations agreed upon at the review, including the new base rate and the effective date thereof, will be entered on the review sheets before completion of the review.

6. A list of the cases arising during the review on which further consideration is desired will be made up by Management. This list, after further consideration, will be discussed by the group making the review. If necessary, any special cases on which a decision cannot be reached will be submitted to the Negotiating Committee of the Affiliate for discussion with local Management.

7. The review sheets are to be numbered consecutively and the district representative, or an officer of the Affiliate, and the Management representative, will sign the original of each sheet, indicating that the review of the sheet is completed.

8. The original or Master copy of the review sheets is to be sent to the Industrial Relations Department [fol. 66] when the review is completed. In District office locations, Management's copy is to be retained by the District Manager.

9. Salary rate reviews will normally be held during April and October.

G. Information

That portion of Company instructions on government orders and laws, or government interpretations of such orders and laws, affecting employes and dealing with wages, hours, and working conditions, as well as instructions on interpretations of this agreement, will, upon issuance by the Company, be sent to the Affiliate and the Federation.

Local Management shall furnish the Affiliate involved with copies of all local Management interpretations of releases from headquarters as furnished under the preceding paragraph and interpretations of local supplements. The Affiliate will be furnished, periodically, with lists of employes transferred, hired, rehired, and released.

H. Payment for Partial Payroll Period

When an employe, having a monthly salary, is added to or separated from the roll after the first working day of the month, or in event of a leave of absence or furlough without pay during the month, payment will be made on the basis of the ratio of days worked during the payroll period to the number of regular working days in the payroll period.

Hours of Work—Section VII

The standard basic work week is forty (40) hours based on eight (8) hours per day, five (5) days per week, Monday to Friday inclusive. An employe's work day is the twenty-[fol. 67] four hour period beginning with his regularly assigned starting time of his work shift, and his day of rest starts at the same time on the day or days he is not scheduled to work. His work week starts with his regularly assigned work period on Monday.

Local conditions may make desirable a basic work week different from the standard basic work week for all or a portion of the employes. Such variations will be a matter for local negotiations. Unusual situations may require modification of the established work schedules in the different units which may warrant special wage payment provisions which will be negotiated locally. The schedules of hours for the established shifts in the bargaining units are contained in the local supplements.

Different methods of attendance control are employed throughout the Company. The method used is determined by local situations and is designed to control local problems and is a subject for local collective bargaining.

In computing hours worked on late arrivals, early departures and for overtime in connection with attendance control, an employe will be credited with time worked

from the start of the one-tenth hour interval in which the recorded starting time falls, and to the end of the one-tenth hour interval in which the recorded time of departure falls. Where starting or stopping times are shown on the pass, entrance before and exit after the indicated time will not be credited. Elapsed hours will be computed in terms of hours and tenths of hours.

A. Regular Hours

The work period for non-exempt employes is established by his Employe Pass. Employes should [fol. 68] *be ready to start work at the beginning of the work period and remain at work until their established quitting time.*

B. Irregular Hours

1. An Irregular Hour Pass will be furnished to non-exempt employes by the Supervisor to authorize and to record that the employe worked hours at variance with his regular schedule.

2. Employees entering the Plant during their scheduled work hours on a regular work day will be required to sign a Late Arrival and Re-admittance Pass.

3. An Irregular Hour Pass will be required for all entrances and exits from the Plant on Saturdays, Sundays or Holidays. If the employe leaves the Plant for lunch hour, the Pass should be time stamped and returned for re-admittance after the lunch hour. The Pass should be left at the entrance when final exit is made for the day.

4. The inclusion of a lunch period in regular working shifts is accepted as a basic principle. For Saturdays, Sundays and Holidays, all employes working more than five hours will be assumed to have taken a lunch period the length of which will be indicated on the Irregular Hour Pass. Under special conditions which require continuous work, the Irregular Hour Pass shall be marked "Straight Through" and the reasons given on the back of the Pass.

5. In case of a mistake in making out the Irregular Hour Pass or a change in the plan, a new Pass should be used instead of making alterations on the original Pass.

[fol. 69] *6. When leaving the Plant for reason of personal convenience during his regular shift a non-exempt employe will secure authorization from his Supervisor and an Irregular Hour Pass.*

7. When leaving the Plant for company business, during his regular shift a non-exempt employe will secure a Company Business Pass from his Supervisor.

8. An employe's weekly time slip should show actual hours worked and must agree with the Irregular Hour Passes and Late Arrival Passes acquired during the week.

Seniority and Personnel

Administration—Section VIII

* * *

F. Furloughs

When furloughing of employes becomes necessary, the local representatives will receive such reasonable advance notice as is practicable under the circumstances. Furloughs are of three (3) types:

1. Regular furloughs are a number of days off per week or per month without pay given employes as a part of the program of sharing work in lieu of reduction of force.

2. Emergency furloughs are periods off without pay resulting from material shortages, power failures, labor disturbances or other conditions where transfer of employes to provide work is not feasible. When such conditions are anticipated, the subject will be discussed with the Affiliate Negotiating Committee.

3. Disciplinary furloughs are time off without pay as a punishment for misconduct of an employe.

* * *

[fol. 70] *K. Absence from Work*

1. An employe absent for a period of two weeks without having, during that time, reported the reason for his absence, will not be paid for the absent time and may be released. Either or both actions will be rescinded if the employe can satisfactorily establish that it was impossible, because of a physical condition, for him to communicate during that time. An employe failing to report for work at the expiration of a leave of absence (other than Military Leave) or after a period of sickness when physically able to work, will be considered as absent.

* * *

Miscellaneous Procedures—

Section IX

A. Jury Duty

Salaried employes will be paid their regular salary while on jury duty but will be expected to report for their regular duties when temporarily excused from attendance at court. No salary will be paid during furloughs or days that would have been furloughs while on jury duty.

* * *

Overtime—Section X

A. Non-exempt Employes

Hours worked by non-exempt employes, except hours worked on Sunday, in excess of 8 hours in any day or 40 hours per week, will be paid at an overtime rate of one and one half times the employe's average earned hourly rate.

Absent hours considered as involuntary will be considered as hours worked for determining overtime. Involuntary absences are defined as follows:

[fol. 71] 1. Funeral or death in immediate family (includes relatives living in same household with the employe, or mother, father, brother, sister or

child who are not of the same household). *Symbol G*

2. Jury duty, *action as election board official, court or government agency summons issued through no fault of the employe. Symbol G*

3. Injury or illness of employe. (*This shall include medical or dental appointments which can only be made during working hours if the Supervisor is given advance notice of such appointments*). *Symbol B*

4. Furloughs for which deduction from pay is made except in case of disciplinary furlough. *Symbol F*

5. Holidays *Symbol H* or Vacation days. *Symbol C*

6. Union activities by elected representatives as contemplated in this agreement. *Symbol G*

7. *Time off during regularly scheduled work week anticipating Saturday or Sunday work will be considered as excusable absence but payment made for such time not worked may be credited against overtime payments due for Saturday or Sunday time for that week. Symbol D*

Hours worked by non-exempt employes on Sunday after forty straight-time hours (including involuntary absences) have been worked in the week will be paid at an overtime rate of twice the employe's average earned hourly rate.

Hours worked on holidays by non-exempt employes will be paid at an overtime rate of one and one half times the employe's average earned hourly rate. Such payment is in addition to the employe's salary if the holiday falls with-[fol. 72] in the work week, Monday to Friday inclusive. No salaried payment is made to employes for holidays falling on Saturdays not worked.

The above provisions apply to the standard basic work week. Special conditions may require exceptions and local overtime provisions to cover such exceptions. These questions are a subject for local negotiations.

The earned rate for overtime purposes will consist of

straight time earnings, including base rate, night turn bonus, group leader remuneration, and incentive payments.

B. Exempt Employees

Administrative and professional employees, exempt under the Fair Labor Standards Act, will, when agreed upon locally, be issued exempt passes.

Overtime hours of exempt employes in District Field areas will be paid on the basis of scheduled hours as provided in a supplement hereto.

Employes who are issued exempt passes shall be paid for extra hours only when scheduled by the supervisor. Incidental overtime worked shall be regarded as casual and a part of the job requirement and not subject to inclusion in schedules. Scheduled overtime will approximate overtime requested or approved by the responsible supervisor. Schedules will be prepared on a monthly basis, in advance, and expressed in terms of equivalent weekly hours. As a general policy schedules requiring Sunday and holiday work should be avoided.

Vacation payment will be limited to the basic work week.

Payment for scheduled overtime will be in accordance with the following schedules:

[fol. 73] Base Salary Rates for 40 Hours	Pay for Scheduled Overtime Over 40 Hours per Week
Up to and including $400.00 per month ($92 per week)	Time and one-half
Over $400 per month (over $92 per week)	$15.00 per scheduled hour ($3.50 per scheduled hour for weekly paid employes) with a maximum payment of $750.00 per month ($173 per week) less 10¢ for each $1.00 of base rate under $750 per month ($173 per week).

C. Eligibility

All salaried employes who are non-exempt as defined under the interpretation of the Fair Labor

Standards Act will be paid overtime on the basis of actual hours worked as shown on weekly time reports, verified by irregular hour passes. All employes who are exempt under these definitions will be paid for scheduled hours as outlined in Section X, Part B of the Agreement between the Westinghouse Electric Corporation and the Federation of Westinghouse Independent Salaried Union.

D. Determination of Hourly Rate for Overtime Compensation

The hourly rate for monthly paid salary employes will be determined by multiplying the monthly salary by 12 and dividing by the product of 52 and the established normal weekly hours.

[fol. 74] *E. Special Provisions*

1. An employe should work overtime when production requirements necessitate, regardless of time lost during the week.

2. Reasons for all absences will be recorded by the employe on the Weekly Report of Salaried Employes (Form 21537).

3. The Attendance Record—Salaried Employes (Form 4809) may be reviewed by the Union Representatives for their group.

Holidays—Section XI

Holidays observed by the Company will be New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving, and Christmas. Special days observed in local areas will not be considered as holidays observed by the Company, but as "time off" days.

When a holiday falls on Sunday, it will be observed the following Monday. Basic hours on a holiday will be credited as time worked for salaried employes, when the holiday is observed within the basic work week of the individual.

Vacation—Section XII

The vacation periods of employes will be arranged so that they do not unreasonably interfere with the operation

of the plant or office. Insofar as practical, the employe will be permitted to take a period satisfactory to him. Where more employes in the same position desire the same vacation period than can be permitted to be absent, preference will be based on service credit.

Certain plants or offices will shut down each year for vacation purposes, and the time of the year for shut-down [fol. 75] will be a matter for local negotiations. In these locations the vacation will run concurrently with the shut-down period. Employes who become eligible for vacations subsequent to the annual shut-down, but before the end of the year, will be granted vacation pay when they become eligible, if they were absent during the shut-down period, without additional time-off for vacation. It is recognized that some employes will be requested to work during the shut-down period.

Salaried employes having one year continuous employment on salary immediately preceding the time of starting vacation will receive a vacation of two (2) weeks with pay. Salaried employes with five years total service will receive a two (2) weeks vacation after six months' continuous employment immediately preceding the time of starting vacation. Salaried employes with twenty (20) years total service, having six (6) months' continuous employment immediately preceding the time of starting vacation, will receive a total of three (3) weeks vacation with pay.

Salaried employes working on an incentive basis will be paid vacations at their current base rate plus the average weekly incentive bonus for the preceding calendar quarter.

In the case of a salary employe where the one year of service immediately preceding the vacation period is a combination of hourly and salary and which includes at least three months on the salary roll (not necessarily continuous), the vacation will be the same as for all other qualified salary employes. An employe will be entitled to vacation for which he would have been entitled as an hourly paid employe up to the time he has completed 3 months of service on the salary roll. If not qualified for vacation at the time of transfer, he will be entitled to a [fol. 76] vacation on hourly basis if he qualifies before completion of 3 months of service on salary, and after com-

pleting his three months of service he will qualify for any difference between salary and hourly paid vacation hours providing the 3 months are completed on or before December 31 of the year in which the transfer occurs.

When an established holiday or its observance falls on a normal week day within the vacation period of a salary employe, an additional vacation day will be granted.

It is the responsibility of Management to see that all employes take their allot-ed vacations.

When an employe is removed from the active payroll for any reason, except disciplinary discharge, payment for vacation not taken for the current year will be made if the employe has qualified for vacation.

1 A normal vacation period begins at the starting time of the employe's regular shift upon the date of the next regular working day after the employe leaves the Works, and expires at the end of the fourteenth or twenty-first calendar day thereafter, as determined by the employe's vacation eligibility, with consideration being given to the provision of the Agreement covering holidays within the normal work week of the vacation period.

a. In certain cases it is necessary or desirable from the viewpoint of the employe or the Company to arrange vacations in periods of less than the full period for which the employe is eligible. However, in no case will a period of less than one full day be taken as a vacation.

[fol. 77] *2. Vacations within a department will be scheduled in advance during the calendar year period with due consideration being given to production requirements. Schedules will be developed in accordance with employe preference. Where more than one request is made for the same period, the employe with the most seniority will receive preference, except by specific agreement between employes and approval of the supervisor.*

3. After an absence from work of 60 days or more for any cause, an employe who is otherwise

qualified must be actively at work for a 7 day period before receiving vacation. If the employe returns from such absence within the last 30 days of the year, and is otherwise qualified for vacation, the 7 day qualifying period will be waived, after he has worked one day.

4. Employes on the disability roll at the end of the year, who have worked during the year and are qualified for vacations but have not taken it due to illness, will be paid for vacation during the last three weeks of the year.

5. Vacations must be taken within the calendar year except that an employe who does not become eligible for vacation until within the last fourteen working days in December may carry over as vacation into January of the succeeding year. In no case, however, shall the vacation period extend beyond the fifteenth working day in January.

6. An employe to be eligible for vacation with the calendar year must have been actively at work during that calendar year in addition to having completed the necessary total and continuous service requirements.

* * *

[fol. 78] Payment for Negotiating Time—

Section XV

It is agreed that negotiating time will be kept to a minimum commensurate with good practice and in the interest of efficiency. Unless of such nature as to be termed urgent, negotiating time will be scheduled by Management and the Federation or Affiliate representatives in advance and in such manner as to least interfere with regular work schedules.

Local Managements of the Company are to be kept advised by the Affiliates as to the names of their authorized representatives.

The following procedure will apply:

A. Officers and other representatives of the Affiliates and/or the Federation, whether exempt or non-exempt em-

ployes, must give notification to and secure a time report from their respective supervisors when stopping work to conduct union business, whether or not with Management (including, without limitation, investigation of complaints that may lead to grievances, handling and adjustment of grievances and attendance at meetings of Union committees) and must return the report to the supervisors when again ready to start work.

B. Payment will be made by the Company at the representative's salary rate only (whether exempt or non-exempt employe) for such time reports covering time spent in:

1. Investigation of complaints that may lead to grievances.
2. Handling and Adjustment of grievances.
[fol. 79] 3. Attendance at meetings with Management within the employe's basic work week.
4. Attendance at meetings with Management outside the employe's basic work week where such attendance is not voluntary.

Time covered by the above reports (subparagraph B) will be considered as hours worked for the purpose of determining overtime.

C. The affiliate will reimburse the Company for all such payments except payments on time reports covering meetings requested by Management and rate reviews. The Company will deduct amounts for which it is entitled to reimbursement from any amounts due the Affiliates, and the Affiliates will make up any deficiencies by separate payment. Time reports covering such payments will be furnished to the Affiliates.

* * *

Modification—Section XVI

A. This Agreement expresses the understanding of the parties and it will not be changed, modified, or varied except by a written instrument signed by a duly authorized agent of each of the parties hereto. Any negotiations relat-

ing to proposed changes or additions in such provisions which are deemed to be Company-wide and generally applicable to the various collective bargaining units will be carried on between representatives as outlined in Section II.

B. This Agreement covers Company-wide matters. All agreements made locally, other than agreements as to settlement of specific grievances, shall be embodied in local supplements to this Agreement, agreed upon by the re-
[fol. 80] spective Affiliates and local Managements. Such local supplements shall be in writing and shall cover the procedures for administering the provisions contained in this Agreement.

C. In addition, the respective Affiliates and Plant Managements may, at any time, present to each other subject-matters covering items of collective bargaining not covered hereby and not deemed of a Company-wide nature or generally applicable to the various certified collective bargaining units, and any negotiations relating to such proposed items will be carried on between the respective Affiliates and Plant Management and any such matters agreed upon will be embodied in local supplements to this Agreement.

• • •

Sections of this Agreement in italicized print have been executed as Local Supplements by T. I. Phillips, Vice President, Westinghouse Electric Corporation and J. H. Dillon, President, Association of Westinghouse Salaried Employees.

[fol. 81] EXHIBIT "F" TO FIRST AMENDED COMPLAINT

Section 2
Division 1G2

July 1949 Procedures

Westinghouse Electric Corporation

Manual of Accounting and Industrial Relations Manual

Part 6—Industrial Relations Policies and Accounting

Recording Attendance and Preparation of Gross Salary Payroll—Non-Exempt Employes

1. General

a. This procedure provides for recording attendance, making payments for salaries at base rates authorized by form 23546, payment of night turn and other extraneous items and computation of overtime bonus and maintaining records within the scope of the Fair Labor Standards Act (Wage-Hour Law)—see 6-1-1G4.

b. For payroll purposes, certain employes represented in collective bargaining, who are in non-supervisory administrative or professional positions which could otherwise be regarded as exempt are paid in accordance with these instructions, provided their base rates are not in excess of $400.00 per month or $92.00 per week (see par. 8).

c. The procedure as outlined in Exhibit "D" provides for preparation of payrolls and writing of checks or pay envelopes without using form 22112.

2. Accounts

2140 Accrued salaries and wages

[fol. 82] 3. Forms

4809 Attendance record—salaried employes
21018 Record of earnings and deductions
21535 Irregular hour pass
21537 Weekly report of salaried employes
21580 Face sheet for weekly report of salaried employes

21993 Late arrival and readmittance pass
22112 Employe's payroll account—salary
22289 Payroll distribution—salary
22501 Request for salary payment
22962 Record of earnings and deductions
23128 Record of earnings and deductions
23198 Record of approved signatures
23546 Authorization for change in payroll

4. Gross Earnings

Gross earnings shall include all compensation for services rendered and are generally related to or associated with a specific weekly or monthly payroll period. When the period is indeterminate, the items shall be included in period in which payment is made.

a. The following shall be included in the average earned rate per hour for computation of overtime:

(1) Regular salaries (converted to fixed rates per hour).
(2) Incentive bonuses.

Note: Certain salaried employes are on a measured incentive basis which is a modification of the standard time plan to suit specific applications. Incentive bonus shall be calculated in accordance with method established for each such plan.

(3) Commissions on sales and bonus for sale of inactive stocks.
[fol. 83] (4) Prizes—i. e., money, merchandise (values stated at cost), savings bonds or any form of value given in connection with sales campaigns or for other rendered service.
(5) Payment for special services rendered the Company by employes.
(6) Group leader bonus (see par. 9).
(7) Night turn bonus (see par. 10).
(8) Meals (when furnished as part of compensation to employes working full or part time in Company operated restaurants, cafeterias or dining rooms).
(9) Band payments (when playing on Company property or at Company sponsored activities).

b. The following items shall not be included in the calculation of average earned rate for computation of overtime:

(1) Patent awards (see 3-52-2W4).
(2) Suggestion awards (see 6-7-3G1).
(3) Tip coupon payments (see 3-52-2G6).
(4) Payment for magazine articles or teaching when not part of employe's regular duties.

c. All items listed under pars. 4a and 4b are gross earnings and are income subject to Social Security Tax and Federal Income Tax Withholding.

d. Gross earnings shall not include:

(1) Travel allowances for use of personal automobile on Company business.
(2) Reimbursement, advances or allowances for transportation, hotel, meals, etc., when traveling on Company business.
(3) Reimbursement for cost of supplies, tools or other approved expenditures made by employes in behalf of or for the Company.

[fol. 84] Note: Such advances, reimbursements or allowances shall not be shown on form 21018, 22962 or 23128 or otherwise included in any record of employe's income or earnings.

5. Established Hours

The established hours of work shall be considered as hours up to and including forty (40) hours which are observed by the plant or office in operation of a regular shift —e. g., 35, 36¼, 37½ or 40. When an employe is transferred to another location having different established hours of work, form 23546 shall be changed to reflect a proportionate change in base rate.

6. Record of Hours Worked

a. Each non-exempt employe shall prepare form 21537 weekly (in ink or typewritten) and affix his full signature in ink (see par. 6d).

b. Irregular hours reported on form 21537 for each day shall be checked with irregular hours reported on forms

21535 and/or 21993 and reported time adjusted to agree with time actually recorded, where necessary.

(1) Payments shall not be made for time reported in excess of that specifically authorized by the Supervisor on form 21535 unless he personally approves the additional time as time actually worked.

(2) Fractional hours shall be recorded in decimals on form 21537 to next higher one-tenth (.1) hour.

(3) Work in excess of forty (40) hours per week or eight (8) hours per day shall be reported as overtime. Where established hours are less than forty (40), extra hours worked up to and including forty (40) hours shall be [fol. 85] reported on form 21537 as irregular hours although payment shall be made at straight time for the extra hours.

(4) Employes reporting during the thirty (30) minute period immediately preceding their regular starting time or departing during the thirty (30) minute period immediately following their regular quitting time shall not report such time as worked. This time is recognized as a period of transition during which no work is to be performed. The supervisor shall see that no productive work is performed during such periods unless specifically authorized. If work is authorized during this period, time worked shall be reported on form 21537 and authorized by form 21535.

(5) Actual traveling time on Company business shall be recorded as elapsed hours when done within the hours regularly worked by employe on a regular work day or when required on Saturday, Sunday or holiday during hours normally worked on regular working days. Traveling time either before or after regular starting and stopping time shall not be recorded as hours worked.

(6) Saturdays, Sundays and holidays spent away from an employe's home location shall be considered as time worked only if he is required to render actual service on such days.

(7) A non-exempt employe shall not be permitted to perform work for the Company away from his regular work station at any time other than the established work hours without specific approval from his supervisor. Form 21535

shall be issued in all such cases and time not recorded by checkboard or clock shall be approved by the employe's supervisor and reported on form 21537 as hours worked.

(8) Programs conducted outside of regular working hours to train employes in higher skills is not time worked if they qualify as follows:

[fol. 86] (a) Attendance on the part of employe is voluntary. No training program shall be considered voluntary if the condition of employe's continued employment in his present job requires attendance.

(b) The employe shall not produce any goods or perform any other productive work during such periods of training.

(c) The training course shall be given outside regular working hours.

(d) The training course is intended to train employes to a new, different or additional skill, and is not intended to make employe more efficient in his present job.

Note: Time shall be allowed employes attending classes during regular working hours. Time shall also be allowed after regular hours unless such classes meet the qualifications listed above. Questionable cases in regard to allowance of time after regular working hours, shall be referred to Director of Payroll Accounting.

c. The supervisor shall verify that hours have been reported in accordance with par. 6b and determine that all absent time, holidays or vacations, have been indicated on form 21537.

(1) Forms 21537 shall be personally approved by department head or authorized supervisor whose signature shall be recorded with Manager of Accounting on form 23198.

(2) Record night turn hours actually worked in proper column. Failure to do so will cause errors in calculation of pay.

(3) Late arrivals and irregular hours shall be substantiated by form 21535 or 21993 and shall be attached to form 21537.

[fol. 87] d. Forms 21537 with attachments (if any) for all non-exempt employes in the department shall be affixed

to form 21580 and forwarded to the payroll location on first working day of the subsequent week. (For preparation of form 21580, see 6-2-1G3).

e. The supervisor shall prepare form 21537 for each non-exempt employe absent on the day scheduled for the submission of form 21537. Upon return of employe, he shall prepare form 21537 which shall be approved by the supervisor and forwarded to payroll location under separate cover. Payroll location shall substitute this form 21537 for the one submitted by supervisor.

f. Form 4809 shall be maintained by each department head or other employe designated for all employes and should be in agreement with time worked as shown on form 21537.

g. Managers of Accounting shall arrange with local management for adequate police supervision at entrances during periods in which non-exempt salaried employes enter or leave the Company premises.

7. Determination of Overtime Hours

a. Hours worked by non-exempt employes, except hours worked on Sunday, in excess of eight (8) hours in any day, or forty (40) hours per week will be subject to overtime payment at one and one-half (1½) times employe's average earned hourly rate.

b. Involuntary absences will be considered as hours worked for determining overtime. Involuntary absences are defined as follows:

(1) Funeral or death in immediate family (includes relatives living in the same household with employe, or mother, [fol. 88] father, brother, sister, or children not living in the same household.

(2) Jury duty.

(3) Illness or injury of employe.

(4) Furloughs for which deduction from pay is made (except disciplinary furlough).

(5) Holidays and vacation.

(6) Union activities by elected representatives as contemplated in union contracts or supplements thereto.

c. Hours worked by non-exempt employes on Sunday, will be subject to overtime payment at twice employe's average earned hourly rate provided employe has worked forty (40) straight time hours (including credit for involuntary absences) during preceding days in workweek.

d. Hours worked on holidays by non-exempt employes will be subject to payment at one and one-half (1½) times employe's average earned hourly rate. Such payment is in addition to employe's base salary if holiday falls within workweek, Monday through Friday. No payment shall be made for holidays falling on Saturday unless worked, in which case such hours are overtime subject to time and one-half rates.

e. A day shall consist of twenty-four (24) consecutive hours beginning with time employe starts to work or is required to start, whichever is earlier. A week is the established workweek consisting of five (5) days, Monday through Friday, and is generally applicable except where local conditions or requirements are such that swing or rotating shifts may necessitate a work schedule which overlaps the standard or established workweek, providing a day or days of rest at some time other than Saturday and/or Sunday. Local supplements shall define the provisions for overtime for such employes.

[fol. 89] f. Non-exempt salaried employes are considered as subject to the provisions of the Walsh-Healey Law (see 6-1-1G2).

8. Payment for Overtime Hours

a. All non-supervisory salaried employes exempt under the Wage-Hour Law as administrative or professional employes and those engaged in outside selling, who are represented in certified bargaining units, whose base rates are under $400.00 per month ($92.00 per week) and all non-exempt salaried employes (regardless of rate) shall be paid for overtime hours as provided in par. 7.

b. Payment for overtime may be made in the pay period next following that in which overtime was worked. When monthly pay periods do not coincide with end of accounting month, payment shall be computed on basis of earned hourly rate in effect in last week of period.

c. Overtime bonus payments shall be charged to the same primary account as that to which fixed salaries are charged. Overtime bonus paid to non-exempt salaried employees shall be shown on Expense and Budget Statements as "Statistical Memoranda" in space provided for this data on the statement forms.

d. Overtime payments shall be booked as of Friday in payroll week in which earned. When not feasible to calculate overtime payments for salaries chargeable to factory expense before closing accounting month, estimate amount and enter on form 22289 for month in which it is earned but not paid. Credit account 2140 in current month and reverse in subsequent month showing reversal as a contra on form 22289 in that month. For overtime not chargeable to factory expense (including Statements 25 which are subsequently cleared to factory expense) book in month [fol. 30] paid where it is not feasible to determine exact figure before closing current accounting month's business.

e. Exempt administrative, professional and outside sales personnel represented in collective bargaining, will, if agreed upon locally, be issued exempt passes. (For payment see 6-2-1G3).

f. Use of factors times base rate (see Exhibit "E") is recommended for computing overtime earnings when there are no other involvements affecting overtime rate—e. g., night turn or clerical incentive earnings.

Note: Develop overtime bonus for salaried employes for statements (see par. 8c and 6-20-7G1) by taking one-third ($\frac{1}{3}$) of total overtime payment even though some double time payments may be involved.

9. Group Leader Bonus

a. Group leader bonus (see Exhibit "C") shall be paid to salaried employes acting as group leaders at all locations of the Parent Company (except Ken-Rad Lamp and Sturtevant Divisions) and all Subsidiary Companies except Westinghouse Radio Stations, Inc., and Westinghouse Electric Supply Company locations at Boston, St. Paul, Philadelphia and Milwaukee.

b. Basis for determining amount of extra remuneration:

(1) The amount of extra remuneration shall be determined on basis of usual number of employes in the group, exclusive of group leader, and varies according to size of group, as follows:

No. in Group (Excluding Leader)	Rate of Additional Payment Beyond Base Rate
2 to 5 (incl.) employes	5. %
6 to 10 (incl.) employes	7.5%
11 to 20 (incl.) employes	10. %

[fol. 91] (2) Variations in the size of groups arising from temporary employment, transfer or reassignment of personnel to cope with temporary changes in volume, special or uncommon work, etc., shall not become the basis for a change in established rate of additional payment.

(3) Where the size of a group is increased or decreased for a period of more than three (3) months, and presumed to represent a change in group's usual or normal size, rate of additional payment shall be changed in accordance with above schedule. Effective date of such change shall be the beginning of the following pay period.

(4) The status of group leaders shall be reviewed at least once each six (6) months, preferably as part of semi-annual rate reviews, to determine that rate of extra compensation is proper; whether a change in size of group justifies a change in rate, etc. Revised lists shall be submitted in June and December of each year or after each rate review to payroll location, showing current status of each group leader.

(5) Where a clerical activity which ordinarily functions as a single group is segregated because of peculiarities in routing of documents, lack of space, or other reasons, the segregated groupings shall constitute separate groups, and a group leader may be established for each, provided the other requirements of group leadership are met. Extra remuneration for such group leaders will be on the basis of number of employes in their respective groups.

(6) When group leader activities cease, due to reclassification, transfer or disbanding of the group; or when size

of group is changed so that percentage of bonus is affected (see par. 9b(3)), payroll location shall be notified immediately by letter.

[fol. 92] c. Authorization and approval of extra payment.

(1) Group leaders bonus shall not be added to base rate authorized on form 23546. Payment shall be authorized by letter or list prepared and signed by department manager and Industrial Relations representative and approved by same executive who ap-roves form 23546. Such letter or list, when approved, shall be forwarded to payroll location as valid authorization only until next locally scheduled semi-annual rate review when a superseding authorization is required which shall include any modifications arising from rate reviews; for reasons outlined in par. 9b(3) or as a result of newly created groups, trar sfers, or removals. Department Managers should review their groups prior to rate reviews to ascertain proper status of each leader. Authorization shall become effective at beginning of payroll period following its receipt.

(2) The use of the symbol "GL" followed by percentage of additional payment is recommended on addressograph plates to facilitate identification of employes eligible for such payment and computation of extra payment.

d. Overtime rates of group leaders receiving these extra payments are affected by such addition, and care should be exercised in using the proper earned rate per hour when computing payment for overtime (see Exhibit "B").

e. In no case shall group leader bonus be paid for a fractional payroll period except in the event of a separation.

10. Night Turn Bonus

a. Salaried employes working night turn (i. e., when regular quitting time is after 9:00 p. m. and up to and including 9:00 a. m. of the following day), shall be paid at night turn bonus equal to ten per cent (10%) of their earnings. The bonus shall not be included in authorized salary rate on form 23546.

[fol. 93] b. Non-exempt employes paid either weekly or monthly—

(1) Non-exempt employes who submit form 21537 weekly shall be paid night turn bonus for only the hours actually worked, except when such employes are on vacation or for holidays not worked.

(2) Form 21537 shall indicate in appropriate column that employe is working night turn. Supervisor's approval will be adequate authorization for payment.

(3) Payment of night turn bonus shall be discontinued when employe is transferred to day turn.

(4) Payment may be made in pay period following pay period in which night turn was worked.

11. Extended Salary Payments

a. Form 21537 shall be prepared by supervisor for each non-exempt employe who is eligible to receive his salary to end of month in which he became ill or disabled (see par. 6e). These forms shall be reviewed by payroll location to determine that payment is not made beyond end of current thirty (30) day period from which illness began without receipt of form 22501.

b. Group leader bonus shall be paid only to end of calendar month in which disability occurred or end of last week in accounting month for weekly employes.

12. Payment for Partial Payroll Period

a. When an employe having a monthly salary is added to or separated from the payroll after the first (1st) working day of the month, or by leave of absence of one (1) week's duration or longer, payment shall be made on basis of ratio of days worked during payroll period to number of regular working days in payroll period (see Note). Where a new employe begins work at any time other than the beginning of workweek, payment shall be made at straight time for [fol. 94] all hours worked up to forty (40) which may include Saturday and Sunday, except that hours in excess of eight (8) in any one day shall be paid for at time and one-half. Payment for hours over forty (40) shall be made at time and one-half (see par. 8). Any one of the

holidays recognized by the Company shall be included in number of working days in period as a day worked, except when a new employe begins work on the day immediately following a holiday, in which case payment for the holiday shall not be made.

Note: A regular working day is a day on which employes are scheduled to work.

b. Factors to be used in paying employes added to or separated from the payroll after the first (1st) working day of the month; or to pay an employe for fewer days than the full month, are as follows:

20 Day Month		*21 Day Month*	
Days	*Factor*	*Days*	*Factor*
1	.0500	1	.0476
2	.1000	2	.0952
3	.1500	3	.1429
4	.2000	4	.1905
5	.2500	5	.2381
6	.3000	6	.2857
7	.3500	7	.3333
8	.4000	8	.3810
9	.4500	9	.4286
10	.5000	10	.4762
11	.5500	11	.5238
12	.6000	12	.5714
13	.6500	13	.6190
14	.7000	14	.6667
15	.7500	15	.7143
16	.8000	16	.7619
17	.8500	17	.8095
18	.9000	18	.8571
19	.9500	19	.9048
20	1.0000	20	.9524
		21	1.0000

[fol. 95]

22 Day Month		*23 Day Month*	
Days	*Factor*	*Days*	*Factor*
1	.0455	1	.0435
2	.0909	2	.0870
3	.1364	3	.1304
4	.1818	4	.1739
5	.2273	5	.2174
6	.2727	6	.2609
7	.3182	7	.3043
8	.3636	8	.3478
9	.4091	9	.3913
10	.4545	10	.4348
11	.5000	11	.4783
12	.5455	12	.5217
13	.5909	13	.5652
14	.6364	14	.6087
15	.6818	15	.6522
16	.7273	16	.6957
17	.7727	17	.7391
18	.8182	18	.7826
19	.8636	19	.8261
20	.9091	20	.8696
21	.9545	21	.9130
22	1.0000	22	.9565
		23	1.0000

13. Furloughs

Furloughs necessary to temporarily reduce the force and spread available work shall be a minimum of one (1) day per week. Employes shall not be separated from the roll, but the time off shall be without pay.

a. Procedure for furloughing salaried employes is as follows:

(1) Furloughs expressed in days are anticipated and are scheduled on a weekly basis, regardless of length of payroll period—i. e., weekly or monthly.

(2) Accumulation of furlough time is not permitted.

[fol. 96] (3) Employes who report their time on form

21537 shall insert the word "furlough" or the symbol "F" opposite day or days absent. When actual time worked does not coincide with the furlough schedule, correction shall be made in a subsequent pay period.

b. Employes paid weekly—The schedule of furlough days shall be submitted to payroll location not later than Monday of the week in which the furlough is to be taken. Payment shall be made on basis of current weeks' fixed salary less number of days furlough.

c. Employes paid monthly. A schedule of furlough days shall be submitted to payroll location by third working day of the month for furloughs to be taken during current month. Payment shall be made on basis of current month's fixed salary in accordance with factors given in par. 12.

d. Time worked on schedule furlough days shall be paid for at employe's base rate per hour in the case of weekly employes, and on basis of factors given in par. 12 for monthly employes, which is the basis for furlough deductions. Hours worked in excess of forty (40) per week or eight (8) per day are paid in accordance with established overtime regulations.

14. Overtime Meals

Employes who receive payment for overtime are not entitled to overtime meal tickets or meal allowances.

Copies to: Union Representatives (U. E. and Federation)

(Here follows 1 Photolithograph, side folio 96a)

DETERMINATION OF HOURS WORKED

Example #1 - Day turn - 40 hour work week

DATE	DAY	HOURS ACTUALLY WORKED				HOURS ALLOWED		ABSENCE SYMBOL
		DAY TURN		NIGHT TURN				
		REGULAR HOURS	IRREGULAR HOURS	REGULAR HOURS	IRREGULAR HOURS	VACATION	HOLIDAY	
	MON.	0						A
	TUE.	7.7						A
	WED	6	2					
	THUR.	C					8	H
	FRI.	0				8		C
	SAT.		10					
	SUN.		2					
TOTAL		13.7	14.					

Form 21537

Interpretation

Double	Time and one Half	Straight	Night	
		0		← 1
		7.7		← 1
	2.	8.		← 2
		8.		← 3
		8.		← 5 + 2
	2.	8.		← 6
3.7		.3		← 9
3.7	4.0	40.0		

Example #2 - Day turn - Furlough - 40 hour work week

DATE	DAY	HOURS ACTUALLY WORKED				HOURS ALLOWED		ABSENCE SYMBOL
		DAY TURN		NIGHT TURN				
		REGULAR HOURS	IRREGULAR HOURS	REGULAR HOURS	IRREGULAR HOURS	VACATION	HOLIDAY	
	MON.	0						F
	TUE.	6						A
	WED	8						
	THUR.	0						C
	FRI.	8						
	SAT.		7.5					H
	SUN		4.					
TOTAL		22.	11.5					

Form 21537

Interpretation

Double	Time and one Half	Straight	Night	
		0		← 7
		6.0		← 1
		8.0		
		8.0		← 4
		8.0		
	7.5			← 8
2.0		2.0		← 5
2.0	7.5	32.0		← 9

Example #3 - Night turn - 40 hour work week

DATE	DAY	HOURS ACTUALLY WORKED				HOURS ALLOWED		ABSENCE SYMBOL
		DAY TURN		NIGHT TURN				
		REGULAR HOURS	IRREGULAR HOURS	REGULAR HOURS	IRREGULAR HOURS	VACATION	HOLIDAY	
	MON			8				
	TUE				8		8	H
	WED			8		8		V
	THUR			6.7				A
	FRI			8				
	SAT				8			
	SUN				4			
TOTAL				30.7	28	8	8	
Form 21:37								

Interpretation

Double	Time and one Half	Straight	Night	
		8.	8.	
	8.	8.	8.	← 80 — 5050
		8.	8.	←
		6.7	6.7	←
		8.	8.	
	6.7	1.3	8.	←
4.0			4.	←
4.0	14.7	40.0	40.7	←

ADDENDA

The employe's time shall be reported on form 21537 in accordance with the examples, which are composite illustrations of the various conditions regarding absent time. The interpretations herein are the values allowed for each hour of work or absence in relation to the total for the basic work week. The column for "straight" time on monthly forms 22112 may be used to indicate time worked over the basic work week when it is less than forty (40) hours.

1. Voluntary absences are indicated as time worked only for the number of scheduled daily hours less hours worked on Saturdays and Sundays which are not holidays.

2. Time worked in excess of eight (8) hours in one (1) day shall be paid at one and one-half ($1\frac{1}{2}$) rate regardless.

3. Vacation time shall be indicated as time worked.

4. Involuntary absences shall be indicated as time worked.

5. Hours over forty (40) (less eight (8) hours per day of furlough) in one (1) week after making adjustments for voluntary absences, shall be paid at one and one-half ($1\frac{1}{2}$) rate if worked on Saturday and shall be paid at double rate if worked on Sunday.

   Note: When furlough time applies to an established work week of less than forty (40) hours, the time to be made up to equal forty (40) hours minus eight (8) hours per day of furlough shall be paid at straight time rate.

6. Employes called in shall be paid four (4) hours if less than that number are worked; unless there is voluntary absence to be made up, hours worked on Saturday shall be paid at one and one-half ($1\frac{1}{2}$) rate and hours worked on Sunday shall be paid at double rate.

7. Furlough hours shall be circled and shall not be included in the addition of the time worked for the balance of the week. Deduction shall be made at the base rate per hour times the established hours per day if paid weekly. If paid monthly, use factors in par. 11.

8. Holiday hours shall be indicated at straight time when observed within the basic work week. Hours worked on a holiday shall be indicated at one and one-half ($1\frac{1}{2}$) rate.

9. Salary for the basic work week (less furlough time if any) shall be paid whether or not all voluntary absence has been made up.

[fol. 97] In United States District Court

Motion to Dismiss First Amended Complaint—Filed October 9, 1952

The defendant, Westinghouse Electric Corporation, by its attorney, Mahlon E. Lewis, moves this Honorable Court to dismiss the plaintiff's First Amended Complaint in the above entitled action for the following reasons:

1. The plaintiff is not the real party in interest within the meaning of Rule 17 of the Federal Rules of Civil Procedure and is therefore not a proper party plaintiff;

2. This Court lacks jurisdiction over the subject matter of the alleged cause of action; and

3. The First Amended Complaint fails to state a claim against the defendant upon which relief can be granted.

Mahlon E. Lewis, Attorney for Defendant.

In United States District Court

Opinion—Filed October 2, 1952

Marsh, *District Judge:*

Plaintiff is an unincorporated association and the collective bargaining representative for certain salaried employees of Westinghouse Electric Corporation, the defendant, at the latter's East Pittsburgh and Homewood, Pennsylvania, plants.

On November 19, 1951, plaintiff association filed a complaint to which was attached the collective bargaining [fol. 98] agreement effective between the parties as of November 1, 1950. The complaint alleges that under the terms of this agreement the defendant is obligated "to pay all of the employees [represented by the plaintiff] * * * their full monthly salary for the month of April, 1951, regardless of whether or not such employees missed a day's work during said month, * * *"; that the defendant refused to pay not less than 4,000 of said employees their full monthly

salaries "having deducted therefrom a proportionate amount attributable to absence from work on April 3, 1951"; and that the aggregate amount due and unpaid is not less than $45,000.00. Plaintiff prayed for judgment against the defendant corporation in that amount with interest and costs.

Jurisdiction is stated to be under Section 301 of Title III of the Labor Management Relations Act of June 23, 1947, 29 U.S.C.A. § 185.

The defendant filed a motion to dismiss on the following grounds: (1) that the plaintiff is not the real party in interest within the meaning of Rule 17, F.R.C.P., 28 U.S.C.A., and is therefore not a proper party plaintiff; (2) that the court lacks jurisdiction over the subject matter; (3) that the complaint fails to state a claim against the defendant upon which relief can be granted.

On the day fixed for hearing on the motion, the plaintiff filed a "First Amended Complaint," and the defendant renewed its motion to dismiss for the same reasons.

The amended complaint is substantially different from the original complaint. First, it states as an additional basis for jurisdiction the "Declaratory Judgment provisions of the Judicial Code, 28 United States Code, Sections [fol. 99] 2201 and 2202." Second, the plaintiff association in the amended complaint has added that it brings the action "in behalf of the individuals in interest whom it represents" as well as for itself "individually." It is alleged that the plaintiff is the collective bargaining agent for not less than 5,000 salaried employees at the defendant's plants aforesaid, engaged in an industry "affecting commerce," and that defendant failed and refused to pay not less than 4,000 of these employees their full monthly salaries by deducting a proportionate amount because of their absence from work on April 3, 1951. Third, in addition to averring a breach of the bargaining contract, it asserts that the defendant's failure and refusal to pay as aforesaid was in violation of the provisions of certain instruments, attached as exhibits, which were supplemental to and incorporated into the bargaining contract. Fourth, instead of asking judgment in favor of the association for $45,000.00 as set forth in the original complaint, it requests a judgment

"* * * against Defendant and in favor of Plaintiff interpreting the aforesaid contract and declaring the rights of the parties thereunder * * *; and to compel the Defendant to make an Accounting setting forth the individual names and amounts of unpaid salaries * * *; and to enter judgment against the Defendant and in favor of the individual employees set forth in paragraph 21 hereof, for the unpaid amount of their salaries, for the month of April 1951, together with interest from April 30, 1951, costs, and a reasonable attorney's fee."

The not less than 4,000 employees, allegedly absent from work on April 3, 1951, were not joined as parties plaintiff or named in the complaint.

[fol. 100] The defendant contends that the court does not have jurisdiction because these claims arise from "the individual employment contract rather than from the Collective Bargaining Contract," and that Section 301(a) of the Taft-Hartely Law gives jurisdiction to a federal court only in the event that the contract in suit was entered into between the employer and the labor organization as distinguished from an individual contract of hiring entered into between the employer and the individual employee. Defendant cites Milk Wagon Drivers Union, etc. v. Associated Milk Dealers, Inc., *et al.*, 42 F. Supp. 584 (D.C. N.D. Ill. 1941) and Joint Council Dining Car Employees, etc. v. New York Cent. R. Co., 7 F.R.D. 576 (D.C. N.D. Ill. 1946) in support of this theory. In the opinion of the court, this contention fails because the complaint under consideration is based exclusively upon the collective bargaining contract between the association and the corporation and not upon the contracts of hiring between the corporation and the individual employees.

We think that the situation *sub judice* is ruled by the case of American Federation of Labor v. Western Union Telegraph Co., 179 F. 2d 535 (C.A. 6, 1950). There the labor organization brought suit against the company upon a collective bargaining agreement which provided that a prior existing company pension plan should remain in full force and effect. The complaint alleged that the com-

pany refused to pay one Mae Hart, a retired employee, the pension to which she was entitled by the terms of the pension plan. It was held that the federal court had jurisdiction under the Taft-Hartley Law § 301(a), and, under the Declaratory Judgment Act, the company could be compelled to pay the pension to Mae Hart and to other retired [fol. 101] employees similarly situated.[1] The Court remanded the case to the district court for trial on the merits. We are unable to distinguish the instant case in principle from that precedent. See also Local 937, etc., *et al.* v. Royal Typewriter Co., 88 F. Supp. 669 (D.C. Conn. 1949);[2] United Shoe Workers of America v. Le Danne Footwear, Inc., 83 F. Supp. 714 (D.C. Mass. 1949). Therefore, we are constrained to deny the first two reasons advanced in the motion to dismiss as being without merit.

We assume, then, in considering the third reason to dismiss, that we have jurisdiction under Section 301(a) of the Taft-Hartley Law to construe the collective bargaining agreement here before us, and under the Declaratory Judgment Act to enforce the rights of the employees as they appear from its terms and provisions. It thus becomes necessary to examine this agreement in order to determine whether the complaint states a claim upon which relief can be granted.

The bargaining contract itself, which was dated November 1, 1950, and which appears as Exhibit "A" in both the original complaint and the amended complaint, does not in our opinion contain any covenant on the part of the cor-

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[1] Specific enforcement against the employer defendant does not seem to be prohibited by the Norris-LaGuardia Act, 29 U. S. C. A. § 52, 101 *et seq.* *Cf.* Textile Workers Union of America, C. I. O. v. Aleo Mfg. Co., 94 F. Supp. 626 (D. C. M. D. N. C., 1950) where the court held that the Norris-LaGuardia Act did not prevent the issuance of a mandatory injunction requiring employer to perform its collective bargaining agreement.

[2] In that case, as here, it seems that the union brought suit on behalf of employees who, we are reliably advised, were not identified by name as parties plaintiff in the caption and complaint.

poration to pay its employees for voluntary absences. This conclusion might be sufficient to dismiss the complaint on the authority of Bakery & Confectionery Workers I. U. v. [fol. 102] National Biscuit Co., 177 F. 2d 684 (C. A. 3, 1949).[3] But plaintiff contends that certain directions and interpretations contained in Exhibit "F", attached to the amended complaint, were incorporated into the 1950 bargaining contract, and that these directions and interpretations illustrate an intention and purpose of the corporation to pay employees for voluntary absences and were sufficient to impose upon it a contractual obligation to do so.

Exhibit "F" is entitled:

"Westinghouse Electric Corporation

Manual of Accounting and Industrial Relations Manual

Part 6—Industrial Relations Policies
and Accounting Procedures

Section 2

July 1949 Division 1G2"

Attached to this exhibit are certain examples and explanatory "Addenda" bearing the date of July, 1947. The sentence relied on appears in the "Addenda" as follows:

> "9. Salary for the basic work week (less furlough time if any) shall be paid whether or not all voluntary absence has been made up."

Another sentence in the "Addenda" is as follows:

> "1. Voluntary absences are indicated as time worked only for the number of scheduled daily hours less hours worked on Saturdays and Sundays which are not holidays."

These directions cannot be construed as constituting a covenant between the plaintiff and the defendant that the

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[3] The Court of Appeals affirmed the District Court, 78 F. Supp. 517, which had dismissed the action after construing the bargaining contract adversely to the contention of the union.

[fol. 103] latter shall pay its employees full salaries for voluntary absences, or, to put it another way, for days not worked regardless of the cause of absences. Expressly, they are instructions by the corporation to its accountants for determining the number of hours per week an employee worked and nothing more. The examples are entitled "Determination of Hours Worked," and the instructions imply that hours lost by voluntary absence shall be made up.

Moreover, contrary to the allegations of the complaint and the contention of plaintiff, these directions and the examples to which they refer, (all contained in Exhibit "F"), have not been "adopted and incorporated as a necessary and integral part of said contract" of 1950, "by reason and virtue of the provisions of paragraph H of Section VI" thereof.

Section VI, paragraph H(1) [4] by its terms is prospective in operation and in any event does not provide that instructions prepared by the corporation in 1947, 1949, or at any other time, shall be adopted and incorporated into the contract of 1950.

Plaintiff also argues that if the bargaining contract does not specifically provide for payment for voluntary absences, it is ambiguous and should be interpreted by the construction placed upon it by the corporation as disclosed by the above quoted sentences in Exhibit "F". It seems to us that the contract becomes ambiguous solely by reason of the arguments and assertions of the plaintiff on matters dehors the contract. In our opinion the terms of the contract between the corporation and the union are [fol. 104] pellucid concerning what type of absence shall be paid absences and what type shall not be paid. Payment for voluntary absences simpyl was not a subject of agreement between the union and the corporation in the 1950 contract and its supplements.[5]

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[4] Sections referred to are in the bargaining agreement, Exhibit "A", unless otherwise indicated.

[5] In this connection it is to be observed that this contract states at Section XVII, 3: "* * * that all agreements ar-

Neither can the omitted subject be supplied by alleged intentions gathered from custom, generosity or prior policy on the part of the corporation. Payment for work which is not performed is an important subject which calls for settlement by explicit agreement and not by judicial construction. *Cf.* Bakery & Confectionery Workers I. U. v. National Biscuit Co., *supra.* The parties themselves recognized the importance because they painstakingly inserted into the contract by way of specific terms the manner in which monthly salaries for all types of salaried employees represented by the association should be determined and paid.

It was provided in Section VI A(2) and Exhibit "C" that these salaries should be fixed between minimum and maximum rate ranges. The object and procedure for review of these salaries was prescribed in Section VI G. But it is also very plain that the parties did not contemplate that the rates of the monthly salaries should be rigid and inflexible whether the employee works or does not work—indeed the implications are very much to the contrary. [fol. 105] The contract sets forth detailed provisions for adding to the salary rate by extra payment for hourly overtime, Section XI, in excess of a 40 hour week based on an 8 hour day, from Monday to Friday, inclusive, Section VII; and by payment of a night turn bonus, Section VI E.

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rived at by the parties * * * are set forth in this Agreement * * *." And in Section III, 2, it is stated: "* * * that it is the responsibility and right of the Company to maintain discipline and efficiency, and agrees that Management shall have the *freedom of action* necessary to discharge its responsibility for the successful operation of the Company. These responsibilities and rights of the Company do not in any way limit any other *specific provision* of this Agreement [emphasis added]." To say the least, it is doubtful if a successful and efficient operation could be maintained by establishing a policy wherein over 4,000 employees shall be paid for those days they choose not to work. The contract gives the corporation the right to enforce attendance as its discretion dictates except as limited by a specific provision dealing with this subject.

Other provisions require deductions from the salary rate in case of furlough, Section IX 9, or leave of absence, Section VIII. The contract specifically requires the corporation to pay for days absent on account of jury duty, Section X 1; vacations, Section XIII; certain union activities, Section XVI B; extended illness or disability, Exhibit "D".

The fact that the parties included these specific provisions *in the contract* negates plaintiff's contention that the corporation from unclear extra-contractual considerations, instructions, and interpretations intended to obligate itself to pay for voluntary absences of one day. There would be no point in providing expressly for payment for certain absences if all were to be compensated.

One other matter remains to be considered and that is whether under the allegations of the amended complaint the plaintiff is entitled to relief. The amended complaint avers that on April 3, 1951, none of the employees concerned was absent on account of "furlough" or "leave of absence," but it does not assert that the approximately 4,000 employees were absent on April 3 because of some reason covered by a specific provision of the bargaining contract which requires the corporation to pay them for that day. We think that in order to state a cause of action it is incumbent upon plaintiff to bring each of the absent employees within the terms of the bargaining contract or its supplements and affirmatively and plainly aver that each was absent because of a reason requiring payment, such as [fol. 106] sickness,[6] and that the corporation refused to pay the increment of salary representing that day's absence. This the plaintiff has not done. The averment that plaintiff "has no actual records of * * * which of said em-

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[6] Plaintiff's counsel in his Supplemental Brief (page 8) argues that Exhibit "D", paragraph 1, provides "that in all cases of sickness for one day, no deduction from monthly salary is to be made." This construction we accept *arguendo* only, because to us the language seems to provide that certain weekly or monthly increments of salary will be paid to an employee who is absent for *extended* periods of time due to sickness or disability.

ployees were absent because of illness or disability" cannot be construed, as plaintiff's Supplemental Brief (at page 9) claims, as an affirmative averment that the not less than 4,000 employees were absent on April 3 because of sickness or disability.

Therefore, in the absence of affirmative averments of the specific causes of the absences of the employees on April 3, it may be assumed, as seems to be understood by both sides, that the approximately 4,000 absences were voluntary. As shown heretofore, it was not provided in the bargaining contract itself that employees should be paid for voluntary absences from work, but that the implications were to the contrary, and that it was not the intention or purpose of the corporation to obligate itself to that extent.

Accordingly, the complaint will be dismissed without prejudice to the plaintiff association by way of amendment to set forth a cause of action upon which relief can be granted.

[fol. 107] In United States District Court

Order Dismissing Complaint—Filed October 2, 1952

And now, to wit, this 2d day of October, 1952, It Is Ordered that the complaint in the above entitled action be and the same hereby is, dismissed, without prejudice to plaintiff by way of amendment to set forth a cause of action upon which relief can be granted.

Rabe F. Marsh, United States District Judge.

In United States District Court

Notice of Appeal—Filed October 29, 1952

Notice is hereby given that the Association of Westinghouse Salaried Employees, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit, from the Order of the District Court of the United States for the Western District of Pennsylvania, entered in this action on October 2, 1952, dismissing the complaint.

Albert C. Shapira, Attorney for Appellant, 1208 Law & Finance Bldg., Pittsburgh 19, Pa.

[fol. 108] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10954

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, Individually, and in Behalf of the Individuals in Interest Whom it Represents, Appellants,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, Appellee

On Appeal from an Order of the District Court for the Western District of Pennsylvania

DESIGNATION—Filed December 30, 1952

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit.

Comes now the Association of Westinghouse Salaried Employees, individually, and in behalf of the individuals whom it represents, Appellants, and pursuant to Rule 24 of this Court, makes this designation of the portions of the record herein to be contained in the Appendix to its brief in the above-entitled proceedings:

1. Chronological list of Relevant Docket Entries.
2. All of the First Amended Complaint of Appellants, but [fol. 109] omitting sub-exhibits "B", "C", and "D" to Exhibit "E" of said First Amended Complaint.
3. The Decision of the District Court for the Western District of Pennsylvania.
4. The Order of the District Court for the Western District of Pennsylvania.

Albert C. Shapira, Counsel for Appellants.

[File endorsement omitted.]

[fol. 110] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10954

[Title omitted]

On Appeal from an Order of the District Court for the Western District of Pennsylvania

STIPULATION FOR EXTENSION OF TIME FOR FILING OF APPELLANT'S BRIEF—Filed January 7, 1953

And Now, to wit, this 30th day of December, 1952, it is stipulated by and between Counsel for the Association of Westinghouse Salaried Employees, individually, and in behalf of the individuals whom it represents, Appellants, and Westinghouse Electric Corporation, Appellee, that the time for the filing of Appellants' brief in the above-entitled case, shall be extended until January 26, 1953.

Albert C. Shapira, Counsel for Appellants. Mahlon E. Lewis, Counsel for Appellee.

Approved, Maris, J., January 7, 1953.

[File endorsement omitted.]

[fol. 111] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10954

[Title omitted]

AMENDED DESIGNATION—Filed January 8, 1953

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit.

Comes now the Association of Westinghouse Salaried Employees, individually, and in behalf of the individuals whom it represents, Appellants, and pursuant to Rule 24 of this Court, makes this amended designation of the por-

tions of the record herein to be contained in the Appendix to its brief in the above-entitled proceedings:

1. Chronological list of Relevant Docket Entries.
[fol. 112] 2. The First Amended Complaint of Appellants, to the following extent:

a. Pages 1 to 6 inclusive thereof.
b. Exhibit "A" attached thereto.
c. Exhibit "B" attached thereto.
d. Exhibit "C" attached thereto.
e. Exhibit "D" attached thereto.
f. The following parts of Exhibit "E" attached thereto:

(1) Page 1, line 1, to but not including "Recognition-Section I", etc.

(2) Page 3—the heading "Cooperation-Section III" only.

(3) Page 4, line 7 to line 17 inclusive.

(4) Page 5—from "Salaries-Section VI" to end of page 14.

(5) Page 15—the heading, "Seniority and Personnel Administration-Section VIII" only.

(6) Page 27—from "F. Furloughs", to but not including "G. Dismissals" etc.

(7) Page 32—from "K. Absence from Work" to but not including, p. 33, "2. Employees who find . ." etc.

(8) Page 33—from "Miscellaneous Procedures-Section IX" to end of page.

(9) Page 34—from "Overtime-Section X", to but not including page 40, "Bulletin Boards-Section XIII" etc.

[fol. 113] (10) Page 44—from "Payment for Negotiating Time-Section XV", but not including page 45, "D. The following shall be . . ." etc.

(11) Page 46—from "Modification-Section XVI", to but not including page 47, "D. Either party to this agreement . ." etc.

(12) Page 51—the boxed-in Note.

g. Exhibit "F" attached thereto, but excepting sub-exhibits "B", "C" and "D" to said Exhibit "F".

3. Motion of Defendants to Dismiss First Amended Complaint.
4. Decision of the District Court for the Western District of Pennsylvania.
5. Order of the District Court for the Western District of Pennsylvania.
6. Notice of Appeal by Plaintiffs.

Albert C. Shapira, Counsel for Appellants.

[File endorsement omitted.]

[fol. 114] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,954

[Title omitted]

On Appeal from an Order of the District Court for the Western District of Pennsylvania

STIPULATION FOR EXTENSION OF TIME FOR FILING OF APPELLANTS' BRIEF—Filed January 22nd, 1953

And Now, to wit, this 21st day of January, 1953, it is stipulated by and between Counsel for the Association of Westinghouse Salaried Employees, individually, and in behalf of the individuals whom it represents, Appellants, and Westinghouse Electric Corporation, Appellee, that the time for the filing of Appellants' brief in the above-entitled case, shall be extended from January 26, 1953 to January 29, 1953.

Albert C. Shapira, Counsel for Appellants; Mahlon E. Lewis, Counsel for Appellee.

Approved: Goodrich, J., Jan. 22, 1953.

[File endorsement omitted.]

[fol. 115] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,954

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, Individually and in Behalf of the Individuals Whom it Represents, Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

ORDER FOR REARGUMENT—Filed September 30th, 1953

It is hereby Ordered that the above-entitled case be reargued before the court en banc.

By the Court, Kalodner, Circuit Judge.

[File endorsement omitted.]

[fol. 116] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,954

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, Individually, and in Behalf of the Individuals in Interest Whom it Represents, Appellant,

v.

WESTINGHOUSE ELECTRIC CORPORATION

On Appeal from the United States District Court for the Western District of Pennsylvania

Argued April 23, 1953

Reargued December 22, 1953

Before Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges

OPINION OF THE COURT—Filed January 28, 1954

By STALEY, Circuit Judge:

Plaintiff appeals from the district court's dismissal of its complaint. We assume the truth of all the factual allegations, which are as follows:

Plaintiff, an unincorporated labor organization, is the bargaining representative of a large group of defendant's salaried employees. Some four thousand of these employees did not work on a certain day in April of 1951, [fol. 117] and, as a consequence, defendant did not pay them for that day. Asserting that defendant's failure to pay was violative of the collective bargaining agreement then in effect between it and defendant, plaintiff seeks, on its amended complaint, a declaratory judgment as to the rights of the parties under the agreement, an accounting to determine the amounts of the allegedly wrongfully withheld salaries, and a judgment running in favor of the individual employees found to be entitled thereto. Defendant presented three grounds for its motion to dismiss: lack of jurisdiction over

the subject matter; wrong party plaintiff; and failure of the complaint to state a claim upon which relief could be granted. The district court decided the first two contentions in plaintiff's favor but dismissed the complaint on the basis of the third.[1] We agree with that result but think that the dismissal should be put upon the ground of lack of federal jurisdiction over the subject matter.

There is no diversity jurisdiction here. Plaintiff relies solely upon the grant of federal power in Section 301(a) of the Labor Management Relations Act:

> "Suits by and against labor organizations—Venue, amount, and citizenship.
>
> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156 (1947), 29 U. S. C. A. § 185(a) (Supp. 1952).

It is plaintiff's theory that the proper construction of the collective bargaining contract requires that defendant [fol. 118] pay the salaried employees regardless of the fact that they did not work and that that provision, though it is in a contract to which only the union and the company were parties, runs to the benefit of each individual salaried employee in the bargaining unit. Since the union entered into the collective bargaining contract for the benefit of those whom it represents, the argument cont' nes, it may sue in federal court by virtue of Rule 17(a)[2] of the Federal

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[1] The opinion of the district court appears at 107 F. Supp. 692 (W. W. Pa. 1952). The dismissal was without prejudice to plaintiff's amendment of the complaint to set forth a cause of action upon which relief could be granted.

[2] "Every action shall be prosecuted in the name of the real party in interest; but . . . a party with whom or in whose name a contract has been made for the benefit of

Rules of Civil Procedure or by virtue of Section 301(b) [3] of the Labor Management Relations Act.

Plaintiff goes too fast, however. Skipping rather lightly over the question of the power of the federal court to act in this case, it expends its strength on the issue of proper party plaintiff. Plaintiff might well be the proper party to assert the present claim (which we do not decide) but nevertheless be unable to find a federal forum with power to hear it. A correct solution of this problem, therefore, requires a construction of Section 301(a) and some fundamental probing into the reciprocal rights and duties, and the sources thereof, of the three groups concerned in a collective bargaining contract.

Section 301(a) is a grant of federal-question jurisdiction and thus creates a federal, substantive right. Shirley-Herman Co. v. International Hod Carriers, 182 F. 2d 806 (C. A. 2, 1950); 3 Moore's Federal Practice § 17.25 (2d ed. 1948). The contract allegedly violated, however, must be one between an employer and a labor organization. Shirley-Herman Co. v. International Hod Carriers, *supra*. That is, we construe the "between" clauses as modifying "contracts" rather than "suits." [4]

[fol. 119] We now turn to an analysis of what happens when a union enters into a collective bargaining contract with an employer and the latter then enters into a contract of hire with an individual employee, in order to determine whether the right here asserted arises from a violation of the collective contract, for if it does not, there is no jurisdiction to entertain this suit. Plaintiff admits that the rights in dispute are the claims of individual employees to their

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another . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . ."

[3] ". . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ." 61 Stat. 156 (1947), 29 U. S. C. A. § 185(b) (Supp. 1952).

[4] But see the contrary construction suggested in Note, 57 Yale L. J. 630, 637 (1948), and in 17 A. L. R. 2d 614, 619 (1951).

salaries. It argues, however, that these individual employees whom it represents are third party beneficiaries of the collective bargaining contract between it and the employer. Thus, though not parties to that contract, it would follow that their rights arise out of it, and the present claims would be based upon a violation of a contract between an employer and a labor organization. Hence, federal jurisdiction under Section 301(a).

We concede that the matter is not free from difficulty, but we think plaintiff's analysis is too superficial. The cases explaining the tripartite relations raised by a collective bargaining contract are quite conflicting, but examination reveals that four rather well defined theories emerge. At one time the view was accepted that a collective bargaining contract was binding only in morals.[5] No more need be said about that. A second and more generally accepted view is that the collective agreement establishes a usage in the plant or industry and that the individual hiring contracts are made with that usage in mind, thus incorporating within the latter the terms of the former.[6] Under this view whatever rights and duties arise are created by the individual contracts of hire. A third theory is that the union, in contracting with the employer, acts as agent for those whom it represents.[7] Thus, the rights and duties arise out of the collective bargaining contract. [fol. 120] Another analysis holds that the union, in contracting with the employer, does so for the benefit of those employees whom it represents and that they are thus third party beneficiaries of the terms of the collective bargaining contract.[8] This is the theory pressed upon us here.

None of the above theories, however, presents an ade-

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[5] Teller, Labor Disputes and Collective Bargaining § 157 (1940).

[6] Harrison v. Pullman Co., 68 F. 2d 826 (C. A. 8, 1934); Yazoo & M. V. R. R. v. Webb, 64 F. 2d 902 (C. A. 5, 1933); Teller, *op. cit. supra*, note 5, § 159; 2 Williston, Contracts § 379A (rev. ed. 1936).

[7] Teler, *op. cit. supra*, note 5, § 167 and cases there cited.

[8] Teller, *op. cit. supra*, note 5, § 168; 2 Williston, *op. cit. supra*, note 6.

quate explanation of the collective bargaining picture,[9] although certain features of each are valid. We prefer an eclectic theory. It is perfectly obvious that the collective contract between the union and the employer is not a contract of hire.[10] ". . . [N]o one has a job by reason of it

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[9] The usage theory would seem to be unrealistic in that it must view the collective agreement as not a contract at all. Hence, the union, representing the collective force of the employees, would have no rights. Moreover, how notorious must the "usage" be in order that it become part of the employment contract? Must the employee actually know of its existence? *Cf.* United States Daily Publishing Corp. v. Nichols, 32 F. 2d 834 (C. A. D. C. 1929).

The agency theory is unable to explain how an employee who is not a member of the union acquires any rights under the collective contract.

Under the third party beneficiary theory, the employee need not show that he contracted with reference to the collective contract; nor need the employee be identified at the time of the collective contract. But that theory leaves the employer without recourse against the employee, since the latter, the beneficiary, had made no promises. Furthermore, how does the third party beneficiary theory have any effect in jurisdictions which do not follow the rule of Lawrence v. Fox, 20 N. Y. 268 (1859)?

The cases illustrating the various theories and results are collected in 18 A. L. R. 2d 352 (1951) and 95 A. L. R. 10 (1935).

[10] In litigation under the United States Arbitration Act, 9 U. S. C. § 1 *et seq.*, collective bargaining contracts have been held to be "contracts of employment." Tenney Engineering, Inc. v. United Electrical R. & M. Workers, 207 F. 2d 450 (C. A. 3, 1953); Pennsylvania Greyhound Lines, Inc. v. Amalgamated Ass'n, 193 F. 2d 327 (C. A. 3, 1952); Amalgamated Ass'n v. Pennsylvania Greyhound Lines, Inc., 192 F. 2d 310 (C. A. 3, 1951); International Union v. Colonial Hardwood Flooring Co., 168 F. 2d 33 (C. A. 4, 1948); Gatliff Coal Co. v. Cox, 142 F. 2d 876 (C. A. 6, 1944). That definition, however, was put upon policy reasons peculiar to the Arbitration Act which have no place in the present setting.

and no obligation to any individual ordinarily comes into existence from it alone." J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 335 (1944). The collective contract between the union and the employer establishes the rates of pay, wages, hours, and conditions to which the employer must adhere in concluding contracts of hire with individual employees. Indeed, Mr. Justice Jackson, in the [fol. 121] J. I. Case case, *supra*, likens the collective contract to tariffs established by a carrier, standard provisions prescribed for insurance policies, or utility schedules of rates and rules for service. These do not of themselves create rights or duties between carrier, insurer, or utility and shipper, insured, or customer. Such rights and duties arise only when carrier and shipper, insurer and insured, utility and customer enter into contracts with each other. So it is in the shop. The collective contract plus the National Labor Relations Act binds the employer to include in the contract of hire which he may conclude with each individual employee in the bargaining unit the precise terms and conditions that have been set up by it. By this we do not mean to follow the usage theory of the collective bargain. Under familiar principles of contract law, the parties must know or have reason to know of the usage and deal with reference to it in order that its terms may become part of their contract. Restatement, Contracts § 247, comment *b* (1932). Such a requirement has little place in the elaborate statutory scheme which presently rules labor relations. The bargaining representative is made the sole agent for the unit and represents not only its members but all employees in that unit whether members of the union or not. The terms of the collective contract thus become part of the individual contract of employment, not because of consensual acts of the employer and employee, but because the law says so no matter how those parties may feel about the matter. J. I. Case Co. v. National Labor Relations Board, *supra* at 336. Applying those principles to our case and assuming that plaintiff's construction of the collective contract is correct, we see that by that contract and the labor relations Act defendant became bound to the plaintiff to include as a term of each individual contract of hire a promise to pay the salaried employee for the type of ab-

sence involved here. But not until an individual entered [fol. 122] into a contract of hire with defendant did the latter become bound to pay that individual under such circumstances, and, if defendant failed to so pay, it breached, not its collective contract with the union, but its contract of hire with that individual employee. Joint Council Dining Car Employees v. New York Central R .R., 7 F. R. D. 376 (N. D. Ill. 1946); Milk Wagon Drivers Union v. Associated Milk Dealers, 42 F. Supp. 584 (N. D. Ill. 1941). See also Knudsen v. Chicago & N. W. Ry., 106 F. Supp. 48, 52 (N. D. Ill. 1952). Consequently, we think that, if there was a violation of contract here, it was a violation of the individual employment contract and, thus, there is no federal jurisdiction since Section 301(a) cannot be invoked.

Plaintiff tells us that the third party beneficiary theory is the modern one, citing the J. I. Case case, *supra*, among others. It is true that the Court wrote at 321 U. S. 332, 336, "But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms." However, Mr. Justice Jackson there also pointed out very clearly that there are two contracts involved the collective one between union and employer and the individual one between employer and employee, and that there is an obvious difference between them in both concept and function. We think the J. I. Case case means that the individual employee is a third party beneficiary of the collective bargaining contract only in the sense that the collective force of all employees in the unit has been brought to bear upon the employer to hammer out a bargain with him, the terms of which, by virtue of the statutory mandate, must be included in the employee's contract of hire, but that that provision of the collective contract specifying rates of pay ripens into a legal right only under the individual contract of hire and only because of the individual employee's labor. We think that this recognizes the functional difference [fol. 123] between a collective bargaining contract and a contract to buy and sell a horse, and yet remains reasonably consistent with accepted doctrine. Indeed, it could hardly be seriously contended that the collective contract can be

fitted into traditional third party beneficiary standards. To begin with, there are some provisions of the collective contract which run only to the benefit of the union and could not run to the benefit of the individual employee. Check-off provisions are probably the outstanding example. Furthermore, the consideration for the employer's duty to pay wages to any individual employee is furnished by the latter, the would-be beneficiary, rather than by the union, the would-be promisee.

The collective contract is made up of a whole complex of clauses which deal with nearly every phenomenon under the industrial sun. The ordinary collective contract may contain detailed provisions relating to union shop or maintenance of membership, hours of work, wages, overtime, holidays, vacations, shift scheduling, leaves of absence, seniority, promotion, transfer, demotion, layoff, discharge, discipline, grievance procedure, arbitration, strikes, lockouts, runaway shop, and safety conditions. The collective contract in this record includes many of those terms. We think that a realistic view of the problem requires that analysis be directed to the possible rights and duties arising out of the specific term of the collective contract that is in dispute rather than attempting to categorize it as a whole. Considered as a whole, it is *sui generis* and simply will not fit into any of the traditional legal pigeonholes. The claim asserted here is the right to wages. The employer has a duty to pay wages only because the individual employee performed his work, not because the union promised to refrain from certain acts. On the other hand it may well be that there are terms of the collective contract which may be of benefit to the employee but this only incidental to a collective benefit, as opposed to the direct benefit to the individual of his right to his wages. By way of illustration of duties imposed upon the employer by virtue of the col- [fol. 124] lective contract itself and correlative rights running in favor of the collective group, *i. e.*, the union, with incidental benefit to the individual, may be mentioned provisions relating to lockout, union shop, runaway shop, arbitration, and safety conditions. We think it is the union's promises which furnish consideration for those employer

promises and, thus, those rights arise out of the collective contract and, therefore, run in favor of the union.[11]

Plaintiff leans heavily upon American Federation of Labor v. Western Union Telegraph Co., 179 F. 2d 535 (C. A. 6, 1950). See also Food & Service Trades Council v. Retail Associates, Inc., 115 F. Supp. 221 (N. D. Ohio 1953). In the former case, the Sixth Circuit held that there was federal-question jurisdiction under Section 301(a) to entertain a suit by the union for the company's refusal to pay a pension to one of its employees. To the extent that that case holds that an individual employee's right to a pension, which is simply another form of wages, arising out of the collective contract rather than the hiring contract, we are, with deference, forced to disagree.

There are cases under Section 301(a) where a union was allowed to assert a claim somewhat similar to the present one, *i. e.*, one which we would consider as arising out of the individual contract of hire.[12] In all but two of those cited, however, the question of federal jurisdiction was passed *sub silentio*, so that they are not binding precedent on the issue of jurisdiction. United States v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33, 38 (1952). In the other two cases there were mere *ipse dixit* statements concerning [fol. 125] federal jurisdiction, and in the case in the Tenth

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[11] MacKay v. Loew's, Inc., 182 F. 2d 170 (C. A. 9), cert. denied, 340 U. S. 828 (1950); Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N. Y. Supp. 898 (Sup. Ct. 1936). See also Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953).

[12] Mercury Oil Refining Co. v. Oil Workers International Union, 187 F. 2d 980 (C. A. 10, 1951) (the employee was a co-plaintiff); Bakery & Confectionery Workers' International Union v. National Biscuit Co., 177 F. 2d 684 (C. A. 3, 1949); Local 793 v. Auto Specialties Mfg. Co., 19 CCH Lab. Cas. Par. 66,162 (W. D. Mich. 1951); United Automobile Workers v. Wilson Athletic Goods Mfg. Co., 18 CCH Lab. Cas. Par. 65,867 (N. D. Ill. 1950); Local 937 v. Royal Typewriter Co., 88 F. Supp. 669 (D. Conn. 1949); United Shoe Workers v. Le Danne Footwear, 83 F. Supp. 714 (D. Mass. 1949).

Circuit the employee was a co-plaintiff who could rely on his individual contract of hire.

It may not be amiss to point out some of the serious questions which might be raised by a contrary decision on this issue. Plaintiff admits that the rights asserted are the individual rights of some four thousand employees. None of them are joined or even named. Indeed, part of the relief sought is the names of those entitled to payment. In such circumstances, how should the doctrine of res judicata be applied? If plaintiff should prevail on the merits, what of an employee in the unit who may have been inadvertently omitted from the reckoning? Is he barred? Is defendant safe in paying the judgment in favor of plaintiff? If plaintiff should lose on the merits, as it did in the district court, are all employees in the unit barred?[13] Plaintiff argues that the employee is a third party beneficiary of the collective contract. Plaintiff is not asserting its right as alleged promisee to that contract, however, but, in a representative capacity, asserts the rights of the alleged beneficiaries. Thus, it seems they would be barred at all events, since the rules of res judicata as applied to the *cestuis* of representative suits would apply.[14] Since the rights asserted here are no longer executory, in that the employees have performed the work which raised in defendant the duty to pay, we think it a factor to be considered that the employees might be thus cut off.

A further problem is created by the effect of those cases which have said that the union is the only proper party to any suit under Section 301(a).[15] If those cases are right,

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[13] See Rock Drilling etc. Local Union No. 17 v. Mason & Hangar Co., 90 F. Supp. 539 (S. D. N. Y. 1950).

[14] Restatement, Judgments § 85(1) (1942).

[15] United Protective Workers of America v. Ford Motor Co., 194 F. 2d 997 (C. A. 7, 1952); Ketcher v. Sheet Metal Workers' International Ass'n, 115 F. Supp. 802, 809 (E. D. Ark. 1953); Local 793 v. Auto Specialties Mfg. Co., 19 CCH Lab. Cas. Par. 66,162 (W. D. Mich. 1951); United Automobile Workers v. Wilson Athletic Goods Mfg. Co., 18 CCH Lab. Cas. Par. 65,867 (N. D. Ill. 1950); Schatte v. Inter-

[fol. 126] then the federal courts are closed to suits by employees to recover wages. This would make the union not only the exclusive agent to negotiate a contract but also the exclusive agent to litigate the individual rights of all those whom it represents under the labor relations Act, whether members of the union or not. We think that if Congress had intended such revolutionary changes, it would have said so in so many words. Couple this with the holding by the Supreme Court of New York that Section 301(a) shows Congressional intent to preempt the field relating to collective bargaining contracts in interstate commerce, Fitzgerald v. Dictograph Products, Inc., 28 LRRM 2611 (1951),[16] and the individual employee is completely out of court. Thus would be taken away the right of the employee to his salary. Everybody admits that it is his individual right and not that of the union. To say that he has a right to his salary but no remedy to enforce it is a judicial nightmare. " 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.' " De La Rama Steamship Co. v. United States,

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national Alliance, 84 F. Supp. 669, 673 (S. D. Cal. 1949), aff'd on other grounds, 182 F. 2d 158 (C. A. 9), cert. denied, 340 U. S. 827 (1950).

[16] See also Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 281 (S. D. N. Y. 1951).

On the question whether Section 301 has made the federal courts the exclusive forum to determine cases involving collective bargaining contracts between employers and labor organizations representing employees in an industry affecting commerce, it is significant that in the tort section of the Labor Management Relations Act, Section 303, in the jurisdictional grant, Congress said that the party injured by the proscribed conduct "may sue therefor in any district court of the United States . . . *or in any other court having jurisdiction of the parties* . . ." (Emphasis added.) § 303(b). There is no such choice of forums under Section 301, seemingly indicating that Congress intended to preempt to the federal courts litigation on collective bargaining contracts. *But see* General Electric Co. v. International Union, 21 U. S. L. Week 2136 (Ohio Ct. App., September 8, 1952).

344 U. S. 386, 390 (1953). This would raise such serious doubts as to the constitutionality of Section 301(a), Lynch v. United States, 292 U. S. 571, (1934), as to require us to avoid such construction. Interstate Commerce Commission v. Oregon-Washington R. R. & Navigation Co., 288 U. S. 14, 40 (1933); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 82 (1932).

[fol. 127] In summary, we hold that the employer's duty to pay a certain rate arises out of the collective bargaining contract plus the sanctions of the labor relations Act. The duty to pay a particular employee wages in the sum resulting from such rate arises out of the individual contract of hire. The latter is the duty alleged here, and, therefore, Section 301(a) is not involved since there is no violation of a contract between an employer and a labor organization. Consequently, we have no jurisdiction over the subject matter. For the same reason the prayer for declaratory relief as to the meaning of this term of the collective contract must meet a like fate.

The order of the district court will be vacated, and the complaint will be dismissed for lack of jurisdiction.

HASTIE, Circuit Judge, dissenting:

The complaint in this case was dismissed in the district court on the defendant's motion which advanced three contentions: (1) that the matter in controversy was not within federal jurisdiction, (2) that the complaining labor union was not the proper party to maintain the suit, and (3) that the claim on its face was without merit. The district court thought that the third objection, and only that one, was meritorious. This court now decides that the first objection was well taken and accordingly vacates the judgment and orders the cause dismissed for lack of federal jurisdiction. However, I think the district court ruled correctly on all three points raised by the motion and that its judgment should be affirmed.

The first question is whether Section 301(a) of the Labor-Management-Relations Act, 29 U. S. C. § 185(a) 1946 ed., Supp. V, which confers upon federal district courts jurisdiction of "suits for violation of contracts between an employer and a labor organization representing employees

[fol. 128] in an industry affecting commerce . . ." is applicable to this controversy. This action is *ex contractu.* The adequate involvement of commerce is unquestioned, but the rights asserted as the basis of relief are beneficially the alleged several rights of a great number of defendant's employees to receive a day's pay for a day on which they did not work. The company argues that its refusal to pay these employees, if actionable at all, must be attacked as a breach of the individual contracts of hire, a matter beyond federal cognizance. *Cf. Christiansen v. Local 680,* 1940, 126 N. J. Eq. 508, 10 A. 2d 168. This court now accepts that reasoning, treating as decisive the undeniable fact that the obligation to pay any particular workman in accordance with the union contract depends upon his individual hiring as well as the collective bargain. I believe the court does not regard the time sequence of these contracts as consequential. I agree that this dual contracting shows that the individual workman can found a common law action for pay upon the terms of his employment without even attempting to make the matter one of federal cognizance under Section 301(a). But in the present circumstances I think the existence of this individual common law right does not prevent the refusal to pay from also being a violation of the collective bargaining agreement and, as such, within federal jurisdiction as extended by Section 301(a).

The union's complaint asserts that its collective bargaining contract with the defendant, as properly construed and mutually understood, obligates the employer to compensate its employees for the period of absence in suit. It is the union's position that, although the employment status of each individual arises out of his hiring, certain of his rights as an employee, including the right in suit, are the legal consequences of undertakings embodied in the collective bargaining contract as enforceable promises of the employer made to the union for the benefit of all who may be employees while the collective bargain remains in force. [fol. 129] This reasoning reflects the analysis made by Mr. Justice Jackson in *J. I. Case Co. v. National Labor Relations Board,* 1944, 321 U. S. 332, 335-6: "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. . . . But the terms of the employment already have been traded out.

There is little left to individual agreements except the act of hiring. . . . The individual hiring contract is subsidiary to the terms of the trade agreement. . . ." I think such analysis is realistic. In terms of the matter presented in this complaint, individual hiring is "subsidiary" to the collective agreement in which the parties addressed themselves to and "traded out" that term of employment which controls pay status on non-working days. Accordingly, it seems proper to say that the asserted right to relief is so predicated upon a violation of the contract between employer and union that the controversy comes within federal jurisdiction as conferred by Section 301(a) of the Labor-Management-Relations Act. *American Federation of Labor v. Western Union Telegraph Co.*, 6 Cir. 1950, 179 F. 2d 535; *Bakery & Confectionery Workers Union, Local No. 492 v. National Biscuit Co.*, 3 Cir. 1949, 177 F. 2d 684; *Mercury Oil Refining Co. v. Oil Workers International Union*, 10 Cir. 1951, 187 F. 2d 980.

My view of the first point makes it necessary that I consider the distinct, though related, question whether the union, without joining individual employees, is a proper party to assert and litigate the present claim. Section 301(a) gives the district court jurisdiction over violations of collective bargaining contracts but does not indicate who may sue on the various claims which may arise out of such contracts. The answer to that question must be found elsewhere.

The employer says the union alone cannot maintain this action because the rights asserted, even if they derive from the collective bargaining agreement, are beneficially the individual rights of the employees who were denied compen- [fol. 130] sation. *Cf. Milk Wagon Drivers Union, Local No. 753 v. Associated Milk Dealers*, N. D. Ill. 1941, 42 F. Supp. 584. The union counters with the contention that Rule 17(a) of the Federal Rules of Civil Procedure and Section 301(b) of the Labor-Management-Relations Act enable it to sue alone to realize the benefits it has won for all the employees.

It seems to me that Rule 17(a) is relevant. That Rule explicitly states that "Every action shall be prosecuted in the name of the real party in interest; but . . . a

party with whom or in whose name a contract has been made for the benefit of another, . . . may sue in his own name without joining with him the party for whose benefit the action is brought; . . ."

In a variety of situations this Federal Rule and its state prototypes [1] have served to enable the maker of a contract for the benefit of another to sue in his own name to vindicate the beneficiary's rights. See *Valentine* v. *Powers*, D. Nebr. 1948, 85 F. Supp. 732, *Linneman* v. *Kirchner*, 1920, 189 Ia. 336, 178 N.W. 899; *Shellberg* v. *McMahon*, 1916, 98 Kans. 46, 157 Pac. 268; *Millers Nat'l. Ins. Co.* v. *Bunds*, 1944, 158 Kans. 662, 149 P.2d 350. A union's effort to enforce the rights it has obtained for the shifting membership of a class it represents through a contract that it made in their interest seems a very appropriate occasion for such procedure. *Local 793 UAW-CIO* v. *Auto Specialties Mfg. Co.*, D. Mich., 1951, 19 CCH Lab. Cas. Par. 66,162; *Local 937 UAW* v. *Royal Typewriter Co., Inc.*, D. Conn. 1949, 88 F. Supp. 669; *Cf. Amalgamated Meat Cutters and Butchers*, [fol. 131] *Local 634* v. *Safeway Stores, Inc.*, Denver, Colo. Dist. Ct. 1949, 16 CCH Lab. Cas. Par. 65,044.

The opinion of the court quite properly points out that present professional views of the jural relationships which grow out of collective bargaining contracts are various and unsettled, and that in the circumstances an eclectic ap-

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[1] Some states have provisions like the Federal Rule. Others approximate this language:

"Every action shall be prosecuted in the name of the real party in interest, but . . . trustee of an express trust, . . . may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section." See 3 Moore, Federal Practice, 2d ed., 1371-72.

Whether expressed in the one form or the other, the result is the same: a person who enforces a contract made in his name for the benefit of another enforces rights belonging to another and, where allowed a money judgment, holds any proceeds recovered in a fiduciary capacity.

proach to the possibilities of the situation is warranted. But going at the problem this way it seems to me that the employer as promisor in the collective contract is in no position to complain that his promise is enforced by the one to whom it was given. And it seems entirely fair to the individual employee that Rule 17(a) be employed according to its tenor to permit his exclusive representative for the making of a contract for his benefit without his personal participation,[2] to proceed similarly on its own initiative to obtain for his benefit a judicial determination of the rights the contract gives him. In this type of statutory relationship and representative status the courts have taken care to protect the individual employees by imposing upon the union, quite apart from Rule 17(a), a strict and high fiduciary obligation of diligence and fairness in advancing the interests of all those it represents. *Brotherhood of Railroad Trainmen* v. *Howard*, 1952, 343 U.S. 768; see *Ford Motor Co.* v. *Huffman*, 1953, 345 U. S. 337, 338.

If in this process the union should succeed in winning, as it sought here, a judicial determination establishing the alleged right of all employees under the collective bargaining contract to be paid for days of voluntary absence, the question would remain whether any money judgment could properly be rendered without joinder or intervention of individual beneficiaries. Some of the above cited cases go that far, treating the plaintiff maker of a third party beneficiary contract as a fiduciary who may obtain a money [fol. 132] award for distribution among the beneficiaries. It is not necessary to pass upon that issue here because the district court rightly concluded that the contract in suit did not create such an obligation as the union asserts in this suit. And since the majority does not reach this point at all, I express no opinion on the matter of neces-

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[2] While neither party argues the point, the pleadings indicate to us that the union as the chosen bargaining representative of the employees concerned here is the exclusive statutory representative of the class for bargaining "in respect to rates of pay, wages, hours of employment or other conditions of employment . . ." as provided in Section 9(a) of the National Labor Relations Act, as amended, 61 Stat. 143, 29 U. S. C. § 159(a) 1946 ed., Supp. V.

sary parties beyond saying that the union suing alone can obtain an effective declaration of the rights and obligations created by the collective bargaining contract, including any created for the benefit of the workmen as individuals.

Coming finally to the merits, I agree with the District Court that the facts alleged do not entitle the plaintiff or the employees it represents to relief. The complaint asserts that an obligation to compensate employees for the day in controversy when they were absent from work is imposed on defendant by the collective bargaining contract which it made with the union November 1, 1950. At the same time the complaint does not state why the employees were absent except that they were not "furloughed" or on "leave of absence", these being two situations of extended absence in which the contract makes it clear that an employee is not entitled to pay. Thus, it necessarily is the theory of the complaint that the contract requires that an employee, not on furlough or leave of absence, must be paid for every day when he voluntarily stays away from work, for whatever reason, just as if he were on the job.

But this claim is based on misconstruction of the contract. That instrument formally establishes a standard basic forty hour, five day work week upon which rates of pay are determined. It also contains a comprehensive enumeration of the absences, both normal and unusual, which the employer must credit toward the forty hour work week just as if the employee were working. Specifically, for employees who have worked more than one year the contract provides annual vacation of two or three weeks without loss of pay. Certain holidays are similarly to be credited as work time. Absences for jury duty and for [fol. 133] certain union activities are authorized without loss of pay. Sick leave is covered by a separate written contract. Thus I think it clear that what the parties intended and accomplished was to cover by specific agreement each type of absence which should be compensable. Accordingly, there is no provision whatever stipulating any particular circumstance in which absence for a single day or any other short period is not compensable. None need be stated since all compensable absences are enumerated. The references to extended absence without pay in the nature of temporary reduction of force, called "furlough", and to

extended absence without pay at the employee's own request, called "leave of absence", are made in connection with an important statement of the agreed seniority status of employees thus temporarily removed from the payroll. There was need to mention this type of absence not because of uncertainty as to pay status but to clarify seniority rights.

I think, as did the District Court, that the contract is clear in its intendment that the absent employees are entitled to pay for the days in suit only if they allege and prove that the situation is within one of the enumerated categories—vacation, holiday, sick leave, jury duty, or negotiating time.

Only brief comment will be made on one other theory of liability urged by the union. It is said that the 1950 contract incorporated certain alleged earlier understandings concerning compensation for periods of voluntary absence. The answer is two-fold. As already shown, the formal agreement is detailed and comprehensive in its enumeration of the circumstances in which there is to be pay for voluntary absence. Moreover, it contains this provision:

> "This Agreement expresses the understanding of the parties in respect to matters deemed by them to be Company-wide and . . . it will not be changed, modified or varied except by a written instrument signed by duly authorized agents of the parties hereto, . . ."

[fol. 134] This suit attempts to "change, modify or vary" the terms of the formal agreement. And the only provision of the contract which defendant points out as containing any possible sanction for the modifying incorporation of any past understanding in the 1950 agreement is in fact, as the District Court pointed out, a prospective reference in subsection H of section VI to interpretations which may be agreed upon in the future. There is nothing in the 1950 contract which makes it either necessary or appropriate to read into it any alleged prior understanding about paying for periods of voluntary absence.

It is my view that the judgment should be affirmed.

I am authorized to state that Chief Judge Biggs and Circuit Judge Kalodner join in this dissent.

A true Copy. Teste:

——, Clerk of the United States Court of Appeals for the Third Circuit.

[fols. 135-136] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,954

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, Individually, and in behalf of the individuals in interest whom it represents, Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—Filed January 28, 1954

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, and the complaint dismissed for lack of jurisdiction; costs to be taxed against the appellant, Association of Westinghouse Salaried Employees, and in favor of appellee, Westinghouse Electric Corporation.

[File endorsement omitted.]

[fol. 137] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 132] SUPREME COURT OF THE UNITED STATES

No. 725, October Term, 1953

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES,
Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES

Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

Page

Opinions below ... 1
Jurisdiction ... 1
Question Presented ... 2
Statute Involved ... 2
Statement ... 2
Specification of Errors To Be Urged ... 6
Reasons for Granting the Writ ... 6
Conclusion ... 15

Cases

American Federation of Labor v. *Western Union Telegraph Co.*, 179 F. 2d 535 (C.A. 6, 1950) ... 5, 6, 9

Bakery and Confectionery Workers' International Union v. *National Biscuit Co.*, 177 F. 2d 684 (C.A. 3, 1949) ... 9

Bethlehem Steel Company, Shipbuilding Division, 89 NLRB 341 [25 LRRM 1564] ... 11

Colonial Hardwood Flooring Co. v. *United Furniture Workers*, 76 F. Supp. 493 (D. Md., 1948) ... 14

Fay v. *American Cystoscope Makers*, 98 F. Supp. 278 (S.D. N.Y. 1951) ... 16

Fitzgerald v. *Dictograph Products Inc.*, 28 LRRM 2611 (N.Y. Sup. Ct., 1951) ... 16

Hamilton Foundry and Machine Co. v. *International Molders and Foundry Workers Union*, 193 F. 2d 209 (C.A. 6, 1951) ... 8

Hughes Tool Co. 104 NLRB No. 32 LRRM 1010 (1953) ... 10

Hughes Tool Company v. *NLRB*, 147 F. 2d 69 [15 LRR Man. 852] (C.A. 5, 1945) ... 11

International Union of Electrical, Radio and Machine Workers v. *United Electrical Radio and Machine Workers*, 192 F. 2d 847 (C.A. 6, 1951) ... 9

International Union, United Furniture Workers of America v. *Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (C.A. 4, 1948) ... 9

Isbrandtsen Co. Inc. v. *Local 1291 of International Longshoremen's Association*, 204 F. 2d 495 (C.A. 3, 1953) ... 9

J. I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) ... 12

Longshoremen v. *Juneau Spruce Corp.*, 342 U.S. 237 ... 15

Markel Electric Products Inc. v. *United Electrical Radio and Machine Workers*, 202 F. 2d 435 (C.A. 2, 1952) ... 9

Mercury Oil Refining Co. v. *Oil Workers Union, CIO*, 187 F. 2d 980 (C.A. 10, 1951) ... 8, 9

Milk and Ice Cream Drivers and Dairy Employees v. *Gillespie Milk Products*, 203 F. 2d 650 (C.A. 6, 1953) ... 6, 9

Paterson Parchment Paper Co. v. *International Brotherhood of Papermakers*, 191 F. 2d 252 (C.A. 3, 1951) ... 9

Operating Engineers v. *Dahlem Const. Co.*, 193 F. 2d 470 (C.A. 6, 1951) ... 14, 16

Page

Schatte et al v. *International Alliance Etc.*, 182 F. 2d 158 (C.A. 9, 1950) 9, 14

Shirley Herman Co. Inc. v. *International Hod Carriers Building Union*, 182 F. 2d 806 (C.A. 2, 1950) 9, 14

Studio Carpenters Local Union v. *Loews Inc.*, 182 F. 2d 168 (C.A. 9, 1950) 9

Tenney Engineering Inc. v. *United Electrical Radio and Machine Workers of America*, 207 F. 2d 450 (C.A. 3, 1953) 9

Textile Workers Union v. *Arista Mills*, 193 F. 2d 529 (C.A. 4, 1951) 7, 9

United Electrical Radio and Machine Workers of America v. *Oliver Corp.*, 205 F. 2d 376 (C.A. 8, 1953) 9

United Protective Workers of America v. *Ford Motor Co.*, 194 F. 2d 997 (C.A. 7, 1952) 8, 9

Wilson and Co. v. *Packinghouse Workers*, 83 F. Supp. 162 (S.D. N.Y. 1949) 14

Miscellaneous

H. R. 3020, 80th Cong. 1st Sess. 13

House Conf. Report No. 510, on H.R. 3020, 80th Cong., 1st Sess., p. 65 13

Sen. Report No. 105 on S. 1126, 80th Cong. 1st Sess., p. 15 13

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on January 28, 1954.

OPINIONS BELOW

The opinion of the District Court (R. 97a) is reported in 107 F. Supp. 692. The opinion of the Court of Appeals (R. 113) is reported in 210 F. 2d 623.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1954. (R. 131). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Section 301 of the Taft-Hartley Act grants jurisdiction to the Federal District Courts over all "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ." May a union, under this provision, sue in a federal district court for breach of that part of its collective bargaining contract with an employer which governs the payment of wages to the employees?

STATUTE INVOLVED

Section 301 of the Taft-Hartley Act, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

> "Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ."

STATEMENT

1. *Facts Alleged in the Complaint.* Petitioner (hereinafter called the union) is a labor organization representing certain employees of the Westinghouse Electric Corporation (hereinafter called the company) at the company's East Pittsburgh and Homewood, Pa. plants. Although the employees represented by the union are all paid on a salaried, rather than an hourly, basis, they are employees within the meaning of the Labor-Management Relations Act, 1947, and are engaged in an industry affecting commerce, as those terms are defined by the Act. 29 U.S.C. §§ 141, 152. (R. 2a, 3a).

On November 1, 1950, the union entered into a collective bargaining agreement with the company, prescribing the wages and other terms and conditions of employment for all employees represented by the union. (R. 4a). In April, 1951, during the term of the contract, the company—contrary to its usual practice—deducted from the monthly salaries of some 4,000 employees represented by the union an amount which would be the equivalent of eight hours' pay, if the employees were paid by the hour, because these employees missed one day's work. (R. 7a). The union claimed that this action violated the collective bargaining agreement and, after exhausting all of the steps of the grievance procedure (R. 8a), brought suit in the United States District Court for the Western District of Pennsylvania.

2. *The District Court Proceedings.* The suit was filed by the union on its own behalf and on behalf of the employees whom it represented. Jurisdiction was claimed under the provisions of Section 301 (a) of the Taft-Hartley Act, which gives to the federal district courts jurisdiction over suits for breach of contract between employers and unions representing employees in an industry affecting commerce. (R. 2a). The relief requested was a declaration of rights under the collective bargaining contract with respect to the matter in dispute, an accounting by the company as to each of the employees from whose salary deduction had been made, and a judgment in favor of such employees for the amounts due. (R 8a).

The company filed a motion to dismiss. (R. 97a). The motion contained three grounds:

(1) The union was not the real party in interest and hence was not a proper party plaintiff;

(2) The Court lacked jurisdiction over the subject matter;

(3) The complaint failed to state a claim against the defendant upon which relief could be granted.

The District Court rejected the first two grounds urged. (R. 100a-101a). On examination of the facts alleged in the complaint, however, it found that in the absence of affirmative averments in the complaint as to the specific causes of the absences of the employees no cause of action was stated. (R. 106a). It therefore dismissed the complaint. (R. 107a).

The union appealed to the Court of Appeals for the Third Circuit.

3. *The Proceedings in the Court of Appeals.* Argument in the Court of Appeals was first heard by a panel of three judges. The case was then set down for re-argument before the court *en banc.* (R. 112). On January 28, 1954, the court, by a 4 to 3 vote, decided that the order of the District Court should be vacated and that the complaint should be dismissed for lack of federal jurisdiction. The sole ground was that, "assuming that the plaintiff's construction of the collective contract is correct" (R. 118), the failure to pay to individual employees the wages specified in the collective contract did not constitute, in law, a violation of that contract within the meaning of Section 301.

The majority opinion, per Staley, J., came to this conclusion by way of an analysis of the various legal theories which have been used to describe the tripartite relationship created by a collective bargaining contract. (R. 116 ff.). None of these theories were found to be satisfactory and the court proceeded to enunciate its own. Under this theory (called "eclectic" by the court) the collective bargaining contract was regarded as comprising two types of provisions: (1) those, such as union shop or checkoff clauses, providing benefits to the union; and (2) those, such as the wage clause, governing compensation and other benefits for the employees. With respect to the first kind of provision, the court conceded, the rights granted arise out of the collective bargaining contract and "run in favor

of the union". (R. 121). With respect to a provision dealing with a subject such as wages, which is what is involved here, however, the court argued that the collective bargaining contract itself only obligates the employer "to include, as a term of each individual contract of hire, a promise to pay the salaried employee for the type of absence involved here." (R. 118-119).

It followed from this analysis, the court said, that the failure to pay the individual employees the wages specified in the collective bargaining contract constituted a violation only of the several contracts of hire between the individuals and the employer, and not a violation of the collective bargaining contract between the union and the employer. Since § 301(a) grants to the federal district courts jurisdiction only over suits for violation of contracts between unions and employers, the claim here was not one over which a federal court has jurisdiction.

> ". . . we think that, if there was a violation of contract here, it was a violation of the individual employment contract and thus, there is no federal jurisdiction since Section 301(a) cannot be invoked." (R. 119).

In reaching this conclusion, the majority opinion in the Court of Appeals expressly recognized, and disagreed with, the contrary holding of the Court of Appeals for the Sixth Circuit in *American Federation of Labor* v. *Western Union Telegraph Company*, 179 F. 2d 535 (C. A. 6, 1950). It noted also a number of other cases in which jurisdiction in this kind of case was assumed "*sub silentio*" or "by mere *ipse dixit* statement." (R. 121).

The three dissenting judges, in an opinion by Judge Hastie, argued that Section 301(a) of the Taft-Hartley Act and the provision in Rule 17(a) of the Federal Rules of Civil Procedure that a party who has made a contract for the benefit of another may sue in his own name, without joining the third party beneficiary, gave the District

Court jurisdiction at least to render a judicial determination of the rights of the employees under the terms of the collective bargaining contract. Since the majority did not reach the point, they expressed no opinion as to whether a money judgment could be entered without the joinder of the individual employees. But they did indicate their agreement with the trial court as to the inadequacy of the facts stated in the complaint to support the cause of action.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the failure of an employer to pay the wages specified in a collective bargaining contract does not constitute a violation of that contract.

2. In holding that Section 301 of the Taft-Hartley Act does not give to unions a federal cause of action for breach of the provisions in a collective bargaining contract calling for the payment of wages to the employees.

3. In dismissing the complaint for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

1. The decision of the Third Circuit here is squarely in conflict with decisions of the Courts of Appeal for the Fourth and Sixth Circuits and is probably in conflict with the views of the Seventh and Tenth Circuits.

The conflict with the Sixth Circuit was acknowledged by the court below. The majority opinion referred to the decision in *American Federation of Labor* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (C.A. 6, 1950), and said: "We are, with deference, forced to disagree." (R. 121.) It did not mention the additional *contra* decision by the Court of Appeals for the Sixth Circuit in *Milk and Ice Cream Drivers Union* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (C.A. 6, 1953).

In the *Western Union* case, a union brought suit against an employer, alleging that the employer had violated its

collective bargaining agreement by refusing to pay a pension to an employee named Mae Hart. The union alone brought the suit. It asked for a judgment declaring that the individual employee was entitled to a pension and for an injunction against the company restraining it from breaching the provisions of the pension agreement with respect to Mae Hart or any other employee represented by the union.

The defendant company moved to dismiss, as the defendant company moved here, on the ground that "the Court lacks jurisdiction of the subject matter." The district court granted the motion. On appeal, the Court of Appeals of the Sixth Circuit was thus faced with the same jurisdictional question presented in this case, arising on a motion precisely the same as that sustained by the Court of Appeals in this case. The decision of the Sixth Circuit, reversing the District Court and holding that Section 301 of the Taft-Hartley Act gave the federal courts jurisdiction over the union's suit, is thus directly contrary to the decision of the Court of Appeals in this case.

Unnoticed by the court below was the conflict between its decision here and a decision of the Court of Appeals for the Fourth Circuit. In *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529, (C. A. 4, 1951), the union brought suit under Section 301(a), alleging that the employer had breached the collective bargaining agreement by refusing to bargain with the union and by failing to give effect to the seniority rights of certain employees. The Court of Appeals held that the subject matter of the union's first grievance, i.e. that the employer had refused to bargain with it, was within the exclusive jurisdiction of the National Labor Relations Board. With respect to the second claimed breach, however, the court of appeals held flatly that the District Court did have jurisdiction.

> ". . . Two questions are presented for our consideration: (1) whether the District Court had jurisdiction

of the cause of action alleged, and (2) if so, whether that court rendered the correct decision. We think that, in so far as the complaint alleged breach of contract on the part of defendant with respect to the rights of the former employees, there was jurisdiction in the District Court to hear and decide the case . . ." (193 F. 2d 529, 532-533.)

In addition to these square holdings by the Fourth and Sixth Circuits on the precise point decided below, there are also decisions in the Seventh and Tenth Circuits which appear to assume, contrary to the holding of the court below, that unions may sue under Section 301(a) for failure of the employer to grant to employees the benefits specified in a collective bargaining agreement. *Mercury Oil Refining Co.* v. *Oilworkers International Union*, 187 F. 2d 980 (C. A. 10, 1951); *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997 (C. A. 7, 1952).[1]

2. The issue here presented is an important issue of federal law which should be decided by this Court. The decision of the court below, limiting federal jurisdiction over contract suits by unions to those in which a breach of an obligation to the union as such is alleged, erroneously deprives the federal courts of a major portion of the jurisdiction specifically granted to them by Section 301 (a).

There are a total of 17 reported decisions by the federal courts of appeals in suits brought under Section 301(a). Of these 17, 8 were suits by employers.[2] One was a suit by

[1] In the *Ford Motor Co.* case the employee whose rights under the collective bargaining agreement were in question was joined as a plaintiff. The Court held that only the union was a proper plaintiff under Section 301. In the particular case however there was also diversity of citizenship between the employee and the defendant company. The Court held that the individual employee's claim, over which the district court had jurisdiction because of diversity could be joined with the union's claim on his behalf over which the court held that it had jurisdiction because of Section 301.

[2] *Hamilton Foundry & Machine Co.* v. *International Molders & Foundry Workers Union of North America et al.* 193 F. 2d 209

individual employees.[3] Of the 8 cases in which the suit was filed by a union, seven involved alleged violations of collective bargaining contract provisions relating to benefits payable to the employees.[4] In only one case[5] did a union sue exclusively for breach of a provision in a collective bargaining contract which provided benefits to the union as such.

These statistics merely underline what is obvious to any one familiar with the collective bargaining process. Contrary to the view of the Third Circuit, a union's function

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(C.A. 6, 1951); *International Union United Furniture Workers of America et al* v. *Colonial Hardwood Flooring Co., Inc., (United States, Intervener)* 168 F. 2d 35 (C.A. 4 1948); *Isbrandtsen Co., Inc.* v. *Local 1291 of International Longshoremen's Assn*, 204 F. 2d 495 (C.A. 3, 1953); *Markel Electric Products, Inc.* v. *United Electrical, Radio & Machine Workers of America, U.E. et al.* 202 F. 2d 435 (C.A. 2, 1952); *Paterson Parchment Paper Co.* v. *International Brotherhood of Paper Makers et al*, 191 F. 2d 252 (C.A. 3, 1951); *Shirley-Herman Co., Inc.* v. *International Hod Carriers, Building & Common Laborers Union of America, Local Union No. 210*, 182 F. 2d 806 (C.A. 2, 1950); *Tenney Engineering, Inc.* v. *United Electrical Radio & Machine Workers of America, (U.E. Local 437)*, 207 F. 2d 450 (C.A. 3, 1953); *United Electrical, Radio & Machine Workers of America et al.* v. *Oliver Corp.*, 205 F. 2d 376 (C.A. 8, 1953).

[4] *Schatte et al.* v. *International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada et al.*, 182 F. 2d 158 (C.A. 9, 1950).

[5] *American Federation of Labor* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (C.A. 6, 1950); *Bakery & Confectionery Workers International Union, Local No. 492* v. *National Biscuit Co.*, 177 F. 2d 684 (C.A. 3, 1949); *Mercury Oil Refining Co.* v. *Oil Workers Union, CIO et al*, 187 F. 2d 980 (C.A. 10, 1951); *Milk and Ice Cream Drivers and Dairy Employees Union, Local No. 98 et al.* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (C.A. 6, 1953); *Studio Carpenters Local Union* v. *Loews, Inc.*, 182 F. 2d 168 (C.A. 9, 1950); *Textile Workers Union of America, CIO* v. *Arista Mills Co.*, 193 F. 2d 529 (C.A. 4, 1951); *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997 (C.A. 7, 1952).

[6] *International Union of Electrical Radio & Machine Workers, CIO et al.* v. *United Electrical, Radio & Machine Workers of America et al.*, 192 F. 2d 847 (C.A. 6, 1951).

as the statutory collective bargaining representative of the employees does not end when it negotiates a document which prescribes their wages and other terms and conditions of employment.

Agreement on a contract is only the beginning of the labor-management relationship. The contract must be interpreted. Its rules must be applied to the myriad unanticipated situations which arise in the day to day operations of the plant. And, in this process, the union necessarily continues to act as the representative of the employees. It is the union which files and processes grievances concerning the interpretation and application of the agreement to particular employees and employment situations.* It is the union which negotiates the settlement of such grievances with the employer and which, where the contract provides for arbitration, is the contesting party in the arbitration proceedings. It is the union which, where these methods of solution do not suffice, naturally presses its interpretation of the contract in litigation.

This function of administering the employee side of the labor contract is, indeed, a part of the statutory obligation of a certified union. The National Labor Relations Board has held that a union which refuses to handle the contract grievances of individual employees who are in the unit represented, but who are not members of the union, violates the Act. *Hughes Tool Co.*, 104 NLRB No. 33, 32 LRRM 1010, 1011-1012 (1953):

> "We believe it is also clear that the presentation and adjustment of grievances is an activity which is subject to this requirement of non-discriminatory representation by the certified union. The prominent part which grievance handling plays in the representation of employees is readily apparent. As the Board has stated previously, 'Grievances are usually more than mere personal dissatisfactions or complaints of

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*See, e.g., the grievance procedure provisions in the contract here involved which are set forth at R. 40a-42a.

employees and their adjustment frequently involves the interpretation and application of the terms of a contract or otherwise affects the terms and conditions of employment not covered by a contract'.[18] The adjustment of grievances, viewed in the larger aspect, constitutes, to a great degree, the actual administration of a collective bargaining contract.

"The importance of grievance presentation and adjustment as a part of the representation of employees is also noted in the statute. Section 2(5) of the Act observes that a labor organization exists for the purpose among others, of dealing with employers concerning grievances.[19] Section 9 (a), as will be more fully discussed hereinafter, specifically recognizes the critical position grievance presentation and adjustment occupies in the relationship between the employee and the employer, the representative and the employer, and the employee and the representative. We find, therefore, in accord with the views of the Fifth Circuit Court that 'The handling of grievances . . . is part of the business [a certified union] has assumed and must be done with impartiality'.[20]

"[18] Bethlehem Steel Company, Shipbuilding Division, 89 NLRB 341 at 344 [25 LRRM 1564].

"[19] Section 2(5) states, in full, 'The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'

"[20] Hughes Tool Company v. NLRB, 147 F. 2d 69 [15 LRR Man. 852] (C.A. 5, 1945) . . ."

In *Hughes Tool* the contract provided for arbitration of differences as to the application of the contract. Here, where the contract does not require arbitration, we have a law suit to adjudicate such differences. In *Hughes Tool* the union was found by the Board to have a duty to present the employee's claims in arbitration without discrimination. But the Court of Appeals says here that the union

does not even have standing to present the employee's claims in court.

We believe that this conclusion would be in error even if the Court of Appeals were acting as a common law court of general jurisdiction. Even without specific statutory authorization for suit, we believe it would be error to utilize a rigid conceptual analysis to deny the existence of the union's legal, contractual, interest in obtaining performance of the contract which it—and it alone—is authorized by law to make on behalf of the employees.

But the Court of Appeals was not acting as a common law court of general jurisdiction. It was interpreting a Congressional mandate specifically authorizing suits between unions and employers for violation of collective bargaining agreements. The difficulties a common law court might have in adapting the traditional concepts of contract law to the institutional framework of the collective bargaining relationship are thus here eliminated.

It should, therefore, be immaterial whether the relationship between the employer, the union and the employees is termed an agency relationship, or a third party beneficiary relationship, or analogized to other arrangements such as those involving carriers or insurance companies (see *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 336 (1944)). Congress, in Section 301, did not enact a theory. It simply and unequivocally granted jurisdiction to the federal courts over all suits between unions and employers subject to the Act in which violations of collective bargaining agreements are involved. And it added to this grant of jurisdiction the further provision, in Section 301 (b), that unions could sue on behalf of the employees whom they represent. Surely language could not have been devised which would more explicitly cover the case at bar.

Nor does the legislative history contain any indication that when Congress used the words "violation of contracts between an employer and a labor organization" it meant

to refer only to parts of such contracts and to exclude all provisions relating to employee benefits. The provision in the House bill[1] which the final version "follows in general",[2] gave jurisdiction to the Federal Courts over "any action for *or proceeding involving* a violation of an agreement between an employer and a labor organization (emphasis added)". The Senate Committee Report said that the Senate bill "makes collective bargaining contracts equally binding and enforceable on both parties."[3] Nowhere in the reports or in the debate is there any suggestion that unions were to be given access to the federal courts only in the very small proportion of disputes with employers as to the meaning of collective bargaining contracts which involve benefits running directly to the union as such.

3. The importance of the question here presented, and the error of the Court of Appeals, is emphasized when it is recognized that Section 301(a) is far more than a bare jurisdictional grant: it creates the very substantive rights to be adjudicated when it is invoked.

The federal district courts, of course, cannot constitutionally be given jurisdiction over cases other than those in which there is diversity of citizenship or in which the cause of action rests on some federal right. Section 301(a), on its face, dispenses with the requirement of diversity of citizenship. Hence, it can be constitutional only if it is interpreted as being not merely a jurisdictional statute, but also a substantive statute creating a federal law governing breaches of labor agreements.

For this reason, the federal courts which have been presented with the issue have uniformly ruled that Section 301 does not merely provide a new forum for the enforcement

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[1] H.R. 3020 80th Cong. 1st Sess.

[2] House Conf. Report No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 65.

[3] Sen. Report No. 105, on S. 1126, 80th Cong. 1st Sess., p. 15.

of contracts theretofore enforceable solely in the state courts. On the contrary, it has been repeatedly held that:

> "the wording of the section and its place in the Taft-Hartley Act demonstrates that the section was designed to protect interstate and foreign commerce by creating a new substantive liability, actionable in the federal courts, for the breach of a collective bargaining contract in an industry affecting interstate or foreign commerce." *Schatte* v. *International Alliance*, etc. 182 F. 2d 158, 164 (C.A. 9, 1950).

Thus, in *Shirley Herman Co.* v. *Hod Carriers Union*, 182 F. 2d 806 (C.A. 2, 1950) the Court held that a substantive defense which was available to a union defendant under the law of the State of New York in a suit for breach of a collective bargaining agreement was irrelevant when the suit was brought under the provisions of Section 301. Similarly, in *Operating Engineers* v. *Dahlem Const. Co.*, 193 F. 2d 470 (C.A. 6, 1951) the union defendant urged that the labor contract, which it was being sued for breaching, was terminable at will under the law of Kentucky. The Court of Appeals for the Sixth Circuit rejected the contention out of hand, on the ground that federal law controlled in this field. And, in the *Schatte* case, *supra*, the Court of Appeals for the Ninth Circuit held that the provisions of Section 301, being substantive and not merely procedural, could not be applied to a breach of contract which occurred prior to its effective date. See also: *Wilson & Co.*, v. *Packinghouse Workers*, 83 F. Supp. 162 (S.D. N.Y., 1949); *Colonial Hardwood Flooring Co.* v. *United Furniture Workers*, 76 F. Supp. 493 (D. Md., 1948).

The Court of Appeals here held that Section 301 does not encompass violations by an employer of those provisions in a labor contract relating to employee benefits. It reached this conclusion by analyzing the substantive rights of the parties in a collective bargaining contract—a matter which, if the decisions cited above are correct, should be

determined as a question of federal law in light of all of the provisions of the federal act governing the relationship between unions, employers and employees. Furthermore, once reached, the conclusion constitutes much more than a limitation on federal jurisdiction. It constitutes a determination as to what substantive law will govern the administration of the particular provisions in a labor contract: those provisions in the contract which are concerned with the employees' wages and their terms and conditions of employment will be governed by state law; those which provide benefits to the union as such will be interpreted in accordance with federal law."[10]

This Court has said that Congress, in enacting Section 301, was "concerned with reshaping labor-management legal relations; and it was taking precise steps to declared and announced objectives." *Longshoremen* v. *Juneau Spruce Corporation*, 342 U.S. 237, 241. Surely there is nothing in the declared and announced objectives of Con-

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[10] The implications of this bifurcation were at least partially recognized by the Court of Appeals. It has been held that suits which can be filed under Section 301 and which are governed by federal law cannot be heard by state courts. *Fitzgerald* v. *Dictograph Products, Inc.*, 28 L.R.R.M. 2611 (N.Y. Sup. Ct., 1951). See also *Fay* v. *American Cystoscope Makers, Inc.*, 98 F. Supp. 278 (S.D., N.Y. 1951) and the statement of the Sixth Circuit with reference to a Section 301 suit that "Congress has occupied the field and closed it to state regulation," *Operating Engineers* v. *Dahlem Const. Co.*, *supra*, at p. 475.

The majority in the Court of Appeals in this case seemed to indicate their agreement with these decisions and, indeed, argued "that Congress intended to preempt to the federal courts litigation on collective bargaining contracts." (R. 123, fn. 16). The Court's principal holding, of course, would exclude from the preempted field of "litigation on collective bargaining contracts" all litigation relating to employee benefits. What if, as a matter of state law, a union would be regarded as having a substantive interest in the employee benefit provisions of a labor contract? Would this issue, having been determined as a matter of federal law, be foreclosed to contrary determination by the states?

gress which supports the interior division of every collective bargaining contract which is accomplished by the decision below.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER TERM 1953

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES
Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 725

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES

Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITIONER'S REPLY BRIEF

The Company, in its brief in opposition to the Petition for a Writ of Certiorari herein, urges two grounds for denial of the petition. One of those grounds is that the conflict between the circuits, relied on by the Union, does not in fact exist. We need not respond to that argument at length. In all of the cases which we cited as being in conflict with the decision below, the courts of appeals *did* hold that Section 301 of the Taft-Hartley Act gave the federal courts jurisdiction over a suit by a union based on collective bargaining contract provisions providing for benefits to employees. In this case, the court below held that there is no such federal jurisdiction. It recognized the conflict (R.121). The cases themselves disclose it.

We do desire to reply briefly to the other argument made by the Company: that the petition requests an advisory opinion because the Union's claim that the Company violated the collective bargaining contract is "wholly without merit and even frivolous (Opp., p. 9)." The

Company argues that this Court should not decide the serious jurisdictional question presented by the petition because there is no substantial dispute as to the merits. It asserts that the court below was of the opinion that the Union's substantive claim was without merit and that "the National Labor Relations Board and the eight Federal Judges who have reviewed the case have all agreed "that it was without merit." (Opp., p. 6).

These statements are simply not so. The National Labor Relations Board has never decided the contractual issue here involved, and the majority of the Court of Appeals did *not* decide or even suggest that petitioner's claim of violation of the contract is without merit. Their jurisdictional decision was *not* an added afterthought to a decision on the merits. To the contrary, the majority opinion of the Court of Appeals assumes throughout that there is merit in the petitioner's claim under the contract.[1] (R. 118). Three judges, who disagreed on the jurisdictional issue, did say that they thought the petitioner's substantive claim was without merit. (R. 129-130.) But they did not file a concurring opinion, they filed a dissent. (R. 124).

The argument that our claim of contract violation is "frivolous", is a new one. The Company did not so argue below—it did not tell the Court of Appeals not to

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[1] This was so stated in the Petition for Certiorari, at p. 4. The Company apparently rests its argument to the contrary wholly on a misinterpretation of our petition. We stated, in a paragraph which plainly discussed only the opinoin of the dissenting judges, that "*they* did indicate their agreement with the trial court as to the inadequacy of the facts stated in the Complaint" (Petition, p. 6, emphasis added). The Company, by neatly replacing a pronoun which we meant to refer to three minority judges with the words "the majority of the Circuit Judges" apparently seeks to persuade this Court that the majority judges actually did agree with the trial court. (Opposition, p. 8)

We do not defend our choice of language. Perhaps the words used in our petition might lead a person unfamiliar with the proceedings to the misinterpretation which the Company makes. But a reading of the opinions below should leave no doubt either as to the actual decision of the Court of Appeals or as to the intention of our language.

concern itself with the jurisdictional issue, because the cause of action was frivolous. To the contrary, it raised the jurisdictional question. It argued it vigorously. And it won. It persuaded the Appellate court to hold that there was no federal jurisdiction. Having won on this ground, and on this ground alone, the Company now says, for the first time, that the case should have been disposed of solely on the merits. It argues here that the jurisdictional question which *was* decided by the court below should not be reviewed because the issue on the merits, which was *not* decided, is obviously to be resolved in its favor. The statement of the position is, we think, argument enough against it.

The Merits

We did not present, as a question to be decided by this Court the question of contract construction which is involved on the merits. We refrained from doing so because the Court of Appeals did not decide that question and because we doubt that it presents a federal issue of such general importance as to warrant review in this Court. We asked only that this Court reverse the judgment of the Court of Appeals on the jurisdictional issue so that we could get what we have not yet had from the Court of Appeals—a decision on the merits.

We still believe that our action was correct. But the respondent's assertion that our claim on the merits is frivolous is, perhaps, sufficient reason to sketch very briefly the nature of the contractual controversy.

The union here is an independent union of *salaried* employees. It does not represent any employees who are paid by the hour. The employees whom it represents are distinguished from the employees of the Company who are represented by other unions by the fact that they are paid on a salary basis, and not on an hourly basis.

The collective bargaining contract conforms with this

basic characteristic of the unit. It provides for the payment of monthly salaries. (R. 13-16). It does not provide for hourly payments, and it does not provide for deductions from monthly salaries for either voluntary or involuntary absences of short duration. It does contain, however, specific provisions as to hours to be worked, both on a daily and a weekly basis and it also contains detailed provisions expressly permitting certain types of absences such as vacations, holidays, negotiating time, etc.

The contractual issue presented by these provisions is whether the absence of an employee, of a type not specifically covered by the contract, gives the Company the right to deduct an hourly equivalent from his monthly salary payments, just as if he were paid by the hour, or whether, on the other hand, the Company's right under the collective bargaining agreement is to require the employees to make up the lost time.

This problem is not dealt within the contract as a pay problem at all, but as a problem to be dealt with under the "Hours of Work" provision. In that section of the contract (R. 20-21) it is provided that "different methods of attendance control are employed throughout the Company. The method used is determined by local situations and is designed to control local problems and is a subject for local collective bargaining." (R. 21).

In amplification of this general provision, the Union annexed to its complaint a copy of a portion of the Company's Industrial Relations and Accounting Manuals (Part 6). These Manuals are referred to in the contract itself as containing "instructions or interpretations of this Agreement" and are required to be furnished to the Union (R. 19).

The material annexed to the complaint clearly shows that it was the Company's interpretation of the contract that "salary for the basic work week (less furlough time if any) shall be paid whether or not all voluntary absence

has been made up." (Sub. Ex. A to Exhibit F to the Complaint, following R. 96.) It further shows, by specific instruction and by example, that a case of voluntary absence of a full day should be dealt with, under the contract, not by making a deduction from salary for the absent hours but only by requiring that make-up hours worked be paid for at straight time.

Thus, the instruction states that "unless there is voluntary absence to be made up, hours worked on Saturday shall be paid at one and one-half (1½) rate and hours worked on Sunday shall be paid at double rate." Example No. 1 shows an employee who was voluntarily absent (Symbol "A") for 8 hours on Monday and .3 of an hour on Tuesday. The same employee was required to work 10 hours on Saturday and Sunday, and 8.3 of the hours so worked were not counted as premium hours but, rather, as make-up hours.

The matter of overtime requires perhaps an additional comment. Despite the fact that the employees here involved are paid on a salary basis, overtime is computed on an hourly basis. This does not make them hourly paid employees. It arises because the Fair Labor Standards Act requires that employees subject to the Act be paid for weekly overtime on an hourly basis. Hence, the collective bargaining contract provides for time and one-half for all overtime for salaried employees who are not exempt from the Act. Altogether different provisions are applicable to employees who are exempt from the Act and the provisions of the Accounting and Industrial Relations Manual with reference to attendance and payroll, attached to the complaint as Exhibit F (R. 81-96) do not, in general, apply to such employees.

It is only in connection with the computation of overtime that any distinction between voluntary and involuntary absences is made in the contract. The contract specifically provides that involuntary absences are to be

considered as time worked for the purpose of determining overtime. No mention is made of voluntary absences, but the clear intendment is that such absences are not to be considered as time worked for overtime purposes, and the accounting instructions (Sub-Exhibit A, following R. 96) carry out this purpose.

In sum, the contract provides for the payment of monthly salaries, not for payment by the hour. It provides for the normal hours of work and says that attendance control is a matter to be governed by procedures outside of the formal contract. It distinguishes between voluntary and involuntary absences, but only for the purpose of calculating overtime, which, under the statute, must be done on an hourly basis. Finally, the Company's own manual shows that the Company construed the contract as requiring that "salary . . . shall be paid whether or not all voluntary absence has been made up."

The District Court (and the three dissenting judges below) erred in their construction of the contract because they misconceived the basic question. They asked whether the contract specifically required the Company to pay for hours voluntarily not worked; they should have asked whether the contract specifically authorized deductions for hours voluntarily not worked from the salaries which it did require to be paid. They noted the careful definition of involuntary absences and presumed that this meant that voluntary absences were to be the occasion for deductions from salaries; they should have noted that the distinction was drawn for purposes of overtime computation only, and that, so used, the distinction was entirely consistent with plaintiff's theory. They ignored entirely the impact of the Company's manual, not as an independent covenant, but as an accepted and long standing interpretation of the contract. Finally, they disposed of the issue on the bare complaint, without an opportunity for trial or full exploration of the issues and

thus violated the familiar principles that on a motion to dismiss the complaint must be construed in the light most favorable to the plaintiff and that, under Rule 12(b), a complaint should not be dismissed unless it appears to a certainty that no cause of action would exist on any state of the facts which could be proved in support of the claim. (See cases cited in Federal Digest, Vol. 31C, pp. 513-520.)

Conclusion

The respondent here is playing fast and loose with the Court. It succeeded in avoiding an appellate decision on the merits by persuading a majority of the Court of Appeals to dispose of the case solely on a jurisdictional issue. Now it seeks to persuade this Court not to review the jurisdictional issue because the case should have been decided in the Company's favor below on the merits. It asks this Court to deny certiorari on an important issue, as to which there is a square conflict between the circuits, by making a summary decision as to the merits of a claim not adjudicated by the Court of Appeals.

Such an argument ought not to be permitted even if the Court agreed with its premise: that the Union's substantive claim is wholly without merit. But our brief sketch of the Union's argument on the merits is sufficient, we believe, to show that the premise is false and that there is a genuine and substantial controversy on the merits.

Respectfully submitted,

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statute Involved	1
Question Presented	2
Statement	2
Summary of Argument	5
Argument:	
I. The District Court Had Jurisdiction	9
II. The Question To Be Decided Here Is One of Federal Substantive Law:	15
1. The Issue	15
2. The Legislative History	18
3. The Uncertain Status of Collective Agreements Under State Law	20
III. The Existing Theories and the Court of Appeals "Eclectic" Theory of the Collective Bargaining Contract Are Unsatisfactory:	25
1. The Older Theories	26
2. The "Eclectic" Theory	31
IV. The Nature of the Collective Bargaining Process Requires That the Union Be Regarded as Having a Contractual Interest in the Performance of the Collective Agreement:	35
1. The Nature of the Collective Bargaining Process	35
2. The Contradiction Between the Decision of the Court Below and the Collective Bargaining Process	39
3. The Legal Interest of the Union	43
V. Section 301 Requires That the Union Be Given the Right to Sue Here:	45
1. The Statutory Language and History	45
2. The Practical Effect of the Decision Below	46
Conclusion	48
Appendix A: *The Structure of the Collective Bargaining Process*	49
Appendix B: *The Content of Written Agreements*, from National Labor Relations Board, Division of Economic Research, Bulletin No. 4 (1939)	91
Appendix C: Excerpts from *Grievance and Arbitration Provisions*, United States Bureau of Labor Statistics Bulletin 908-16 (1950)	96
Appendix D: Table of Suits Brought Under Section 301(a)	100

CITATIONS

Page

Cases:

Allied Mills Inc., 82 NLRB 854 (1949) 36

American Federation of Labor v. *Western Union Telegraph Co.*, 179 F. 2d 535 (6th Cir. 1950) 4

American-Hawaiian S. S. Co. v. *Sailors Union of the Pacific*, 37 F. Supp. 828 (N.D. Cal. 1941) 29

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Boston & Maine Transp. Co. v. *Amalgamated Ass'n*, 106 F. Supp. 334 (D. Mass. 1952) 17

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Elrod v. *Luchenback Steamship Co.*, 28 LRRM 2046 (N.Y. City Ct. 1951) 28

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1937) 15

Faultless Caster Corp. v. *United Electrical Workers*, 119 Ind. App. 330, 86 N.E. 2d 703 (1949) 32

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Fitzgerald v. *Dictograph Products, Inc.*, 28 LLR Man 2611 (N.Y. Sup. Ct. 1951) 17

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H. J. Heinz Co. v. *NLRB*, 311 U.S. 514 (1941) 19, 25

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Hudson v. *Cincinnati, N.O. & T.P. Ry. Co.*, 152 Ky. 711, 154 S.W. 47, (1913) 27, 35

Page

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Hughes Tool Company v. *NLRB*, 147 F. 2d 69 (C.A. 5, 1945) 38

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International Plainfield Motor Co. v. *United Automobile Workers*, 34 LRR Man. 2718 (D. N.J. 1954) 17

J. I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) 24, 25, 29, 43

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Masetta v. *National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E. 2d 15 (1953) 22, 29

McDonald v. *Wockner*, 267 P. 2d 97 (Wash. 1954) 31

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Moore v. *Illinois Central R. Co.*, 312 U.S. 630 (1941) 13, 14, 15

NLRB v. *Sands Mfg. Co.*, 306 U.S. 332 (1939) 36

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National Mutual Ins. Co. v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949) 17

Nichols v. *National Tube Co.*, 34 LRR Man. 2183 (D.C., N.D. Ohio 1954) 42

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Page

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Pettus v. *Olga Coal Co.*, 72 S. E. 2d 881 (W. Va. 1952) 41

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Pullman Standard Car Mfg. Co. v. *Local Union No. 2928*, 152 F. 2d 493 (7th Cir. 1945) 26

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Swart v. *Huston*, 154 Kan. 182, 117 P. 2d 576 (1941) 22

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Transcontinental Air v. *Koppal*, 345 U.S. 653 (1953) 15, 41

Trimble v. *Robertshaw Thermostat Co.*, 73 D. & C., 239, 31 West. 283 (1949) 42

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Page

Statutes:

29 U.S.C. §§ 151-168 24
29 U.S.C. § 158(a)(3) 25, 29
29 U.S.C. § 158(d) 25, 33, 36
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29 U.S.C. § 185 1

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Restatement, Contracts §§ 379, 380 (1932) 22, 30
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OCTOBER TERM, 1954

No. 51

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES

Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 81) is reported in 107 F. Supp. 692. The opinion of the Court of Appeals (R. 96) is reported in 210 F. 2d 623.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1954. (R. 114.) The petition for certiorari was filed on April 26, 1954, and granted on June 7, 1954 (R. 115). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTE INVOLVED

Section 301 of the Taft-Hartley Act, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

> "Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of

the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ."

QUESTION PRESENTED

May a union, under Section 301 of the Taft-Hartley Act, sue in a federal district court for breach of that part of its collective bargaining contract with an employer which governs the payment of salaries to the employees?

STATEMENT

This is a suit by a union against an employer for breach of the collective bargaining contract between them. The union, petitioner here, is the Association of Westinghouse Salaried Employees. It represents, and has represented for more than 10 years, the more than 5,000 non-supervisory salaried employees of the company at its plants in East Pittsburgh and Homewood, Pennsylvania. (R. 2-3.) The company, respondent here, is the Westinghouse Electric Corporation. It is engaged in the manufacture and sale of electrical products in interstate commerce. (R. 2.)

The union is affiliated with the Federation of Westinghouse Independent Salaried Unions. (R. 2.) The Federation, in behalf of, and in conjunction with, its affiliates, has from time to time entered into national collective bargaining agreements with the company covering those bargaining units as to which the Federation or an affiliate has been certified by the National Labor Relations Board as the exclusive collective bargaining agent. (R. 8.)

The agreement sued upon here (R. 7-41) was entered into by the Federation and the company on November 1, 1950. This national agreement provides that the company will pay and "any employee will . . . receive" a salary in

accordance with a local schedule based upon the classification system in each separate bargaining unit. (R. 11.) Pursuant to this provision, a schedule of monthly salary rates for the various classifications in the units represented by the petitioner was executed on November 16, 1950 (R. 4, 42).

The national agreement also contains a no-strike clause (R. 32) and a grievance procedure (R. 32-35). The grievance procedure provides, among other things, that any dispute as to the interpretation, application or claimed violation of either the national agreement or any local supplement shall constitute a grievance. It further provides for a procedure for handling such disputes, beginning with negotiations, at three separate steps to be specified in local supplements, between the affiliate and the local management, and progressing to a national appeal level, at which representatives of the Federation and the company "meet in an effort to settle such grievances." (R. 34.)

The contract does not provide for final and binding arbitration of disputes which cannot be settled by negotiations at the national appeal level. It provides, instead, that "the parties may consider referring such matters to an impartial umpire or board by mutual agreement." (R. 35.) It also provides, as an exception to the general no-strike clause, that after the grievance procedure is exhausted without settlement, the Federation may authorize a strike over any dispute within the scope of the grievance procedure. (R. 32.)

On April 3, 1951, a number of the employees represented by the union were absent from work, and the company deducted a proportional amount from their monthly salaries because of that absence. The union, alleging that this action by the company constituted a violation of the collective bargaining agreement, as interpreted and heretofore applied, filed a grievance and exhausted the procedures established under the agreement for settlement by

negotiation (R. 6). Then it filed this suit against the company for breach of contract.

The complaint alleged substantially the facts set forth above. It prayed for (1) a judgment interpreting the agreement and declaring that the company's action was in violation thereof, (2) an order directing the company to make an accounting setting forth the individual names of those from whose salaries deductions had been made and the amounts of the deductions, and (3) a judgment in favor of the individual employees for the amounts of the unpaid salaries (R. 7). Jurisdiction was claimed solely under Section 301(a) of the Taft-Hartley Act, 29 U.S.C. 185(a), 61 Stat. 156.

The company filed a motion to dismiss. (R. 81.) The motion contained three grounds:

(1) The union was not the real party in interest and hence was not a proper party plaintiff;
(2) The Court lacked jurisdiction over the subject matter;
(3) The complaint failed to state a claim against the defendant upon which relief could be granted.

In support of the first two grounds, the company urged (R. 83) that the claim here arose only from the individual contracts of hire under the collective bargaining agreement and hence was not cognizable under Section 301(a). This argument was rejected by the District Court (R. 83-84), relying on *American Federation of Labor* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (6th Cir. 1950). The District Court then went on to examine the collective bargaining agreement and held, on the merits, that the agreement did not create any obligation to pay employees for absences other than those for causes specifically provided for. (R. 88.) Since the complaint did not specify the cause of the absences, the District Court held that no cause of action was stated and ordered the complaint dismissed. (R. 89).

The union appealed to the Court of Appeals. (R. 89.)

After argument had been heard, the case was set down for re-argument before the Court *en banc*. (R. 95.) On January 28, 1954, the Court, by a 4 to 3 vote, decided that the order of the District Court should be vacated and that the complaint should be dismissed for lack of federal jurisdiction. (R. 107.) The sole ground was that, "assuming that the plaintiff's construction of the collective contract is correct" (R. 101), the failure to pay to individual employees the wages specified in the collective contract did not constitute, in law, a violation of that contract within the meaning of Section 301(a). The majority did not reach the question of contract interpretation involved on the merits.

A petition for certiorari, raising only the issue decided by the majority in the Court of Appeals, was filed by the union on April 26, 1954. The writ was granted on June 7, 1954. (R. 115.)

SUMMARY OF ARGUMENT

The District Court clearly had jurisdiction over the complaint. It satisfactorily alleged the existence of a contract between an employer and a labor organization representing employees in an industry affecting commerce, and was brought for a claimed violation of that contract. The holding of the court of appeals that no federal jurisdiction existed because rights under the particular provision in the contract sued did not run to the labor organization is not a holding that the district court had no jurisdiction, but, rather, a holding as to the substantive rights of the parties under the collective bargaining agreement. The holding of the court of appeals that no federal jurisdiction existed was clearly in error.

This conclusion, however, only serves to lead to the resolution of the genuine problem presented by the decision of the court of appeals: the relative rights of the union, the employees and the employer which the courts will rec-

ognize as arising out of a collective bargaining agreement. Before arguing the proper resolution of this substantive problem it is necessary to decide whether that problem is to be resolved by reference to federal law or state law. While the legislative history of Section 301(a) is not crystal clear, it is plain that Congress did intend that collective bargaining contracts should be enforceable by both parties at law, and that the federal court should be open to resolve disputes as to the meaning of collective bargaining contracts as a method of avoiding strikes and industrial conflict.

This basic Congressional purpose can be effectuated only by holding that the substantive problem as to the distribution of rights under a collective bargaining contract must be settled in accordance with federal law, consonant with the other provisions of the National Labor Relations Act, as amended. Furthermore, interpretation of Section 301 as according a substantive right of action, rather than merely a forum in which to enforce state accorded rights, avoids a difficult question as to the constitutionality of Section 301 which would otherwise be presented.

Assuming that the allocation of the legally enforceable rights created under a collective bargaining agreement is to be determined as a matter of federal law, neither the existing theories summarized by the Court of Appeals nor the "eclectic" theory formulated by it is satisfactory. The older theories fail to account properly for the institution of collective bargaining as it has developed under the National Labor Relations Act and contain serious internal inconsistencies. The theory advanced by the court of appeals completely distorts the true nature of the collective bargaining relationship.

The theory formulated by the court of appeals is based, in the first instance, upon a separation of the collective agreement into two parts. According to the court, the employer promises the union to perform only those provi-

sions of the agreement containing benefits to the union as such. Its promise with respect to matters such as wages is only to include the negotiated provisions in the individual contracts of hire with the employees. It follows from this theory that the only suit which may properly be brought for breach of the collective agreement is a suit to obtain the benefits promised to the union; a failure to pay wages or other benefits to individuals can be remedied only by a suit on the individual contract of hire.

The separation made by the court of appeals is itself inconsistent with Section 301(a) because it finds the only enforceable contract with the union in provisions which are not essential to a collective bargaining agreement and which may not, in fact, exist in many such agreements. Disregarding this, however, and examining the "contract to make a contract" theory itself, we find that although the theory is logically consistent it completely misrepresents the nature of the rights and obligations inherent in the collective bargaining relationship.

Collective bargaining, as it has developed under the provisions of the National Labor Relations Act, includes more than negotiation by a union of the terms of a formal collective bargaining agreement. The process is a continuing one. The union is charged, under the Act, with the duty of negotiating with the employer not only concerning the agreement itself but also concerning the interpretation and application of that agreement. The union fulfills this continuing collective bargaining function by processing the grievances of individual employees who claim that the company has violated the collective bargaining agreement. In so doing it acts as the exclusive representative of all of the employees, as provided for in Section 9(a) of the Act. The only exception is that an individual employee does have a right to have his grievance adjusted without the intervention of his union, but this is subject to the union's right to be present at such an ad-

justment and to the requirement that the adjustment be consistent with the collective bargaining agreement.

The existence of this continuing relationship between the employer and the union is totally inconsistent with the theory that the only obligation contained in the collective agreement is to incorporate its term in the individual contracts of hire. This conclusion is underlined when the interrelationship between the grievance machinery and the lawsuit as a method of contract enforcement is examined. If it is held, as we believe it should be, that exhaustion of the grievance machinery is a necessary prerequisite to suit, this necessarily implies that the right to sue does not arise solely from the individual's contract of hire. Even if the right to sue is regarded as an alternate to the grievance procedure, a conclusion that the individual and only the individual can sue would provide a remedy inconsistent with the Congressional recognition of the union's interest in those cases which are handled through the grievance procedure and would in effect provide for individual rather than collective bargaining.

The collective group represented by the union has an interest in the enforcement of the terms of the collective agreement, even beyond the precedent-making effect of the settlement of individual complaints where the meaning of the agreement is in doubt. An important element in the consideration bargained for in the collective agreement is the establishment of a fixed rule of law with respect to the items set forth in it. A failure to accord to an individual employee a benefit specified in the agreement thus constitutes not only a deprivation of his rights but also an injury to the group as a whole. The union, in short, has bargained for a commitment to apply the rules uniformly and a failure to do so constitutes a breach of the employer's contract with it.

This would be sufficient, we believe, to compel a court to hold that the union should be given the right to sue here

even in the absence of a specific statutory mandate. But here we have an explicit provision that the federal courts shall take jurisdiction of suits between unions and employers for breach of collective bargaining agreements. Since the provisions relating to individual employees are at the heart of such agreements, and the statutory mandate is without exception or qualification, the mandate must be construed as conferring a right to sue for violation of such provisions. If there were any doubt, it would be removed by Section 301(b), which specifically authorizes a union to sue as an entity in the federal courts in behalf of all of the employees whom it represents in collective bargaining.

Finally, examination of the suits which have been brought under Section 301 in the past seven years makes it evident that the effect of the construction given to the statute by the Court of Appeals would be to exclude from the jurisdiction granted by Congress a major portion of that which was intended to be granted.

ARGUMENT

I—THE DISTRICT COURT HAD JURISDICTION

Section 301(a) provides that the federal district courts shall have jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . ." This simple language bristles with problems, as we shall show below. But, no matter how those problems are solved, certain elements at least are sufficient to bring a case within the statutory language. These elements are: (1) an employer engaged in commerce or in an industry affecting commerce, as defined in the Act[1]; (2) a labor organization representing the employees of such an em-

[1] The requirement that the employer himself be engaged in commerce is not specifically set forth in the statute, which, literally read, requires only that the contracting labor organization be one that represents employees who are so engaged and does not specifically require that this be true of the employees involved in the suit.

ployer[2]; (3) a contract between the employer and the labor organization; (4) a suit between the employer and the labor organization for claimed violation of that contract.[3] All of these, we submit, are present here.

The Court of Appeals here reached the conclusion that there was no jurisdiction under Section 301(a) through an analysis of the substantive rights of the parties in a collective bargaining agreement. It examined the older theories which had been developed to fit the unique tri-partite relationship involved in such an agreement into conventional common law concepts of contract, and declared that none of them were satisfactory. It then enunciated its own theory. Under this theory (called "eclectic" by the court) the collective bargaining contract between the company and the union was regarded as comprised of two distinct types of provisions: those provisions, such as the union shop or the checkoff, which provide benefits to the union or the collective group of employees as such; and those provisions, such as those governing the payment of wages, which provide benefits for the individual employees. Since, in the first kind of provision the company contracted with the union to accord certain benefits directly to it, failure to grant those benefits can be remedied by a suit on the contract by the union. The second kind of provision, however, the Court found to be quite different. The collective bargaining agreement is not a contract of employment: the union does not, normally, agree to furnish employees nor does it agree that any particular employees will agree to work. Similarly, the company does not agree to

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[2] This again is not literally required by the statute.

[3] There is a controversy as to whether the "between" in the statute refers to the suit or to the contract. See the opinion of the court below (R. 108), *United Protective Workers* v. *Ford Motor Co.*, 194 F. 2d 997 (7 Cir. 1952) and the cases collected in 17 A.L.R. 2d 614, 619 (1951). The resolution of this controversy is immaterial here, where both the contract and the suit are between the union and the employer.

hire any particular employees nor, indeed, does it normally agree that it will hire any employees at all. The agreement is simply that if there are persons who desire to work for the employer and if the employer agrees to employ them, they will be accorded the benefits provided for in the collective bargaining agreement.

This phenomenon, the Court said, means in legal terms that the union has made an agreement with the employer under which the employer is obligated "to include, as a term of each individual contract of hire, a promise to pay the . . . employee" in accordance with the provision of the collective bargaining contract. (R. 101-102.) Under this construction of the collective bargaining agreement the employer's duty to pay a particular employee arises, not out of the collective bargaining agreement, but out of the individual contract of hire incorporating that agreement. Since a failure to pay to the employees was the violation alleged in this case, the Court concluded that Section 301(a) was not involved and there was no federal jurisdiction, since there was no violation of a contract between an employer and a labor organization.

We will deal below with the merits of this "eclectic" theory of the rights of the parties under a collective bargaining contract. But here we question only the last step —the conclusion that there is no federal jurisdiction. In deciding jurisdiction we are not concerned, or should not be concerned, with the substantive rights of the parties or the correct interpretation of a collective bargaining contract. If the Court of Appeals is right in its theory—which we do not concede—all that is proven is that the plaintiff here, under a proper construction of the contract sued upon, does not have a cause of action. It is not proven that the District Court did not have jurisdiction, except in the strained sense that a court only has jurisdiction where the plaintiff is entitled to recover. While it is possible, perhaps, to define the concept of jurisdiction as

including only the cases where the plaintiff's claim is found justified, such a definition robs the concept of all utility and defeats the distinction between questions of jurisdiction and questions of substantive law.

If the Court of Appeals had said that there was no contract at all here, then perhaps it would be a little more accurate to say that, on that basis, the District Court had no jurisdiction. But the Court of Appeals conceded that there was a contract between the defendant and the plaintiff governing the payment of salaries to the employees. It construed that contractual provision as merely requiring the company to agree with the individual employees to pay them the specified salaries. It concluded, therefore, that the alleged failure to pay—once the individual agreements were made—was not a violation of the contract with the union but a breach of the agreements with the individual employees. But clearly this suit was brought by the union on a claim that the failure to pay the employees the salaries specified in the collective bargaining agreement was a violation of that agreement itself. That the Court of Appeals construed the action of the company as not constituting a breach of its contract with the union but a breach of its contracts with the individual employees does not mean that the District Court did not have jurisdiction over the suit but only that the union's claim lacks merit.

Suppose that a plaintiff brings suit alleging that the defendant has failed to perform his contract obligation to pay money to the plaintiff. Federal jurisdiction is based upon diversity. Suppose the defendant contends that the contract, properly construed, did not require the defendant to pay the plaintiff but only to procure the agreement of some third person, resident in the same state as the defendant, to pay. Would this argument, if sustained, defeat the diversity jurisdiction? Obviously not. The court

would have jurisdiction, but the plaintiff would lose his lawsuit.

Or suppose A sues B in tort for personal injuries, again basing jurisdiction on diversity. Surely B does not defeat the jurisdiction if he proves, on trial of the case, that it was not he but some third person, resident in the same state as the plaintiff, who committed the tort. Again, the court would have jurisdiction, but the plaintiff would lose on the merits.

So, in this case, there was a contract between the plaintiff union and the defendant company. The plaintiff claimed that the company's action in not paying the salaries specified in the contract violated the contract. The Court of Appeals held that it did not—that the salary provisions of the collective bargaining agreement did not require the company actually to pay the specified salaries but only to make agreements with the employees to pay them, and that, hence, the failure to pay the employees—once the appropriate agreements with them had been made—did not constitute a breach of the contract with the union. But this means only that the Court concluded that the plaintiff's claim was bad on the merits, not that the court was without jurisdiction of the claim.

That this conclusion is correct is made clear if we assume that Section 301(a) did not exist and jurisdiction here had been grounded on diversity of citizenship between the union and the company. Clearly, the question of whether a failure to pay the wages specified in the collective bargaining agreement was a breach of the written collective bargaining agreement with the union or of the oral contract of hiring of the individual employees would be a question of substance to be decided by reference to state law, not a procedural or jurisdictional question.

This was squarely held in *Moore* v. *Illinois Central R. Co.* 312 U.S. 630. The *Moore* case involved a discharge alleged to be in violation of a collective bargaining agree-

ment. Two issues were presented: (1) Whether the suit was barred by the statute of limitations, and (2) whether the plaintiff was required to exhaust his administrative remedies. The first issue depended on whether the individual's legal rights were deemed to rest on his oral contract of hire, adopting the terms of the collective bargaining agreement, or on the written agreement itself. The state statute of limitations on the former would be three years and on the latter six. The state court held that the individual employee could rest his claim on the written collective bargaining agreement itself and that, hence, the six-year statute applied. The case was then removed to the federal courts, the court of appeals, being of the opinion that the contract sued upon was the verbal contract of hire, held that the three-year statute applied. 112 F. 2d 959 at 964. This court reversed, holding that this was a matter of state law, on which the federal courts had to follow the decisions of the supreme court of the state.

The issue in this case, therefore, is not a jurisdictional one at all. To the contrary, it involves a substantive question of the most fundamental importance—the substantive legal rights of union, company and employee in the institution which we call the collective bargaining agreement. The question, it is true, is a generic one. The contractual theory which the Court of Appeals applied did not arise from the words or phrases of this particular collective bargaining agreement. The Court quite properly considered that the issue was one which concerned collective bargaining agreements in general and that it could not be resolved without "some fundamental probing into the reciprocal rights and duties, and the source thereof, of the three groups concerned in a collective bargaining contract." (R. 98.) The result of this probing, however, is not the resolution of a jurisdictional controversy but, to the contrary, a definition of the substantive legal rights which these three groups derive from the collective bargaining agreement.

We conclude, then, that the District Court clearly had jurisdiction over this case, since all of the elements required by Section 301(a) of the Taft-Hartley Act were present, including a claim that the collective bargaining contract between the company and the union had been violated. We turn now to the substantive question of whether a union has any legal interest in the performance of the provisions in a collective bargaining agreement specifying employee benefits.

II—THE QUESTION TO BE DECIDED HERE IS ONE OF FEDERAL SUBSTANTIVE LAW

1. *The Issue*

Before beginning any "fundamental probing into the reciprocal rights and duties" (R. 98) created by a collective bargaining contract, it is perhaps wise to ask whether we are free to probe at all. Perhaps we must accept the results of any prior probe which may have been conducted by the courts of Pennsylvania. The contract involved here was executed in Pennsylvania and was to be performed in Pennsylvania; if jurisdiction were based on diversity and there were no Section 301(a), the substantive rights of the parties clearly would have to be resolved by referring to the law of Pennsylvania. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64; *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941); *Transcontinental Air* v. *Koppal*, 345 U.S. 653 (1953).

The court of appeals was not seriously troubled by this possibility, and stated flatly that Section 301(a) created a substantive federal right. (R. 98.) But, in an earlier case under Section 301(a), the same court had said that a Pennsylvania collective bargaining agreement should be construed in accordance with Pennsylvania law.[4] The matter is certainly not free from doubt.

[4] *Paterson Parchment Paper Co.* v. *International Brotherhood of Paper Makers*, 191 F. 2d 252, 253 (3rd Cir. 1951), which was recently followed in *Insurance Agents* v. *Prudential Insurance Co.*, E.D. Pa., Aug. 6, 1954, 34 LRRM 2678.

Section 301(a) is written in terms which appear to be exclusively jurisdictional. It provides simply that suits for violation of collective bargaining agreements may be brought in the district courts of the United States. It does not expressly state what law shall be applied. Since the section was passed, the question of whether the substantive rights to be enforced in a suit under it derive from federal or state law has been much litigated and discussed.[5]

Most courts have concluded that the section created a substantive federal liability for breach of a collective bargaining agreement and that considerations of state law are immaterial in cases brought under it. Thus, in *Shirley Herman Co.* v. *Hodcarriers Union*, 182 F. 2d 806 (2nd Cir. 1950), an employer sued a union under Section 301, claiming damages for a strike in violation of a collective bargaining agreement. Judgment was rendered against the defendant union and it appealed, arguing, among other things, that the plaintiff had not shown bad faith, as he was required to do under the law of New York in order to recover from a union for breach of a no-strike provision. The contention was rejected by the Court of Appeals for the Second Circuit, which held flatly that Section 301 created a generally applicable and uniform federal substantive right and that "state law as to bad faith is therefore of no relevance." 182 F. 2nd at 809.

A similar result has been reached by the Sixth Circuit in *Operating Engineers* v. *Dahlem Construction Co.*, 193 F. 2nd 470 (6th Cir. 1951), by the Ninth Circuit in *Schatte* v. *International Alliance of Theatrical Stage Employees,*

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[5] See, *e.g.*, Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297 (1954); Hays, *Federalism and Labor Relations in the United States*, 102 U. Pa. L. Rev. 959, 975 (1954); Comment, *The Specific Performance of Collective Bargaining Agreements under Section 301(a) of the Taft-Hartley Act*, 21 U. Chi. L. Rev. 251; Note, *Section 301(a) of the Taft Hartley Act*, 57 Yale L. J. 630 (1948).

182 F. 2nd 158 (9th Cir. 1950) and by a number of district courts.[6]

The statement that Section 301 created a substantive federal right has often been made in response to a contention that the statute is unconstitutional under Article III of the Constitution since it seeks to give the Federal courts jurisdiction, irrespective of diversity of citizenship, over cases not arising under "the laws of the United States." See *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949). The courts have almost uniformly appeared to believe that the contention could be defeated only by rejecting its premise—that the substantive rights to be enforced in a Section 301(a) action are derived from state law.[6a]

It has been suggested, however, that there is another answer and that Section 301 can be constitutionally sus-

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[6] Boston & Maine Transp. Co. v. Amalgamated Ass'n, 106 F. Supp. 334 (D. Mass. 1952); Pepper & Potter, Inc. v. Local 977, 103 F. Supp. 684 (S.D. N.Y. 1952); Fay v. American Cystoscope Makers, 98 F. Supp. 278 (S.D. N.Y., 1951); Textile Workers v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D. N.C., 1950); Textile Workers Union v. Arista Mills Co., 193 F. 2d 529, 533 (4th Cir. 1951); Fitzgerald v. Dictograph Products, Inc., 28 LRR Man 611 (N.Y. Sup. Ct., 1951). State law has been followed, without discussion of the problem, in: Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers, 191 F. 2d 252 (3d Cir., 1951); Mercury Oil Refining Co. v. Oil Workers International Union, 187 F. 2d 980, 983 (10th Cir., 1951); Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge, 91 F. Supp. 596, 614 (W.D. Wash., 1950) *aff'd.* 188 F. 2d 356 (9th Cir. 1951).

[6a] United Electrical Workers v. Oliver Corp., 205 F. 2d 376 (8th Cir. 1953); Colonial Hardwood Flooring Co. v. International Union, 76 F. Supp. 493 (D. Md. 1948) *aff'd.* 168 F. 2d 33 (4th Cir. 1948); International Plainfield Motor Co. v. UAW, 34 LRR Man 2718 (D. N.J. 1954); Waiaula Agricultural Co. v. United Sugar Workers, 114 F. Supp. 243 (D. Hawaii 1953); Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45 (D. Del. 1952); Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162 (S.D. N.Y. 1949). See Note, *Section 301(a) of the Taft-Hartley Act*, 57 Yale L. J. 630 (1948).

tained even if it be construed as merely conferring upon the federal courts jurisdiction to decide controversies based on the law of the states as to breaches of collective bargaining agreements.[7]

We do not propose to argue this constitutional issue here, since we believe that it will be found independently that Congress must have intended that Federal rather than State law would govern the substantive rights of the parties to collective bargaining contracts falling within the scope of the federal act. We merely point out that a serious constitutional issue would be raised if the statute were construed as a bare grant of federal jurisdiction.

2. The Legislative History

Although the legislative history of Section 301(a) is not conclusive with respect to the abstract question of whether Congress intended to make state or federal law applicable in suits brought under Section 301(a), the evidence that is available indicates that the proponents of the bill, at least in the Senate, intended to create a federal substantive law. The report of the Senate Committee noted, in urging that the proposed section be enacted, that there were then no federal laws creating a "substantive right" to sue unions for breach of contract.[8] The opponents of the bill, on the other hand, stated that state substantive law would be applicable under the proposed statute,[9] but this was stated as a premise for the argument that Section 301(a) was unnecessary and of doubtful constitutionality.

The legislative history does, however, make one thing clear: Congress intended to insure that collective bargain-

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[7] Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass., 1953); Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 184 (1953); Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 601 (1954).

[8] Sen. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 17 (1947).

[9] Sen. Min. Rep. No. 105, Pt. 2, on S. 1126, 80th Cong., 1st Sess. 14 (1947); H.R. Min. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 400 (1947).

ing agreements, once made, would be binding and enforceable. The House bill provided for suits in the federal district courts, very much as the enacted bill does except that the jurisdictional test, which in the House bill related to the effect on commerce of the contract in question, was made to depend on the status of the employer or the union.[10] The House report, although it seemed to assume that only unions violated contracts, left no doubt that its purpose was to make both parties "equally responsible . . . for contract violations." H.R. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 6 (1947).

The Senate bill not only provided for "suits for violation of contracts concluded as the result of collective bargaining" but also provided that breach of such contracts, either by a union or an employer, should constitute an unfair labor practice. In explaining the provision authorizing suit the Senate Committee first said:

> "The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the Committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made. *(H. J. Heinz & Co.*, 311 U.S. 514)'" Sen. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 15 (1947).

The report then discussed the difficulties involved in

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[10] H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 65 (1947).

suing unions in the absence of a federal "substantive right" and concluded:

> "Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." *Id.* at 17.

And, in debate, Senator Taft described the purpose of Section 301(a) as follows:

> Mr. Taft: "What is the purpose of title III? The purpose of title III is to give the employer and the employee the right to go to the Federal courts to bring a suit to enforce the terms of a collective-bargaining agreement—exactly the same subject matter which is contained in titles I and II. It is impossible to separate them. The committee had difficulty even in separating matters as between titles, and moved some matters back and forth from one title to another." 93 Cong. Rec. 4141 (1947).

Although the proponents of the bill in both houses seemed to assume that the only significant issue was whether unions could be sued, there can be no question as to their intention to provide that both parties should have the right to bring effective suit.

3. *The Uncertain Status of Collective Agreements Under State Law.*

If there existed in the law of the various states a commonly accepted and understood concept of the collective bargaining agreement as an enforceable contract, then arguments could be made as to whether minor variations in that concept from state to state were intended to be retained in actions under Section 301(a) or whether, for the sake of uniformity in the enforcement of the national labor policy, a single federal law should obtain. But the significant fact, as this case shows, is that there was in

1947, and is now, no such common understanding as to the fundamental rights and duties, if any, which are created as between the three groups concerned in a collective bargaining agreement.

Collective bargaining agreements, unlike contracts for the sale of goods, contracts of employment, or negotiable instruments, had no accepted common law status. " Most of our courts have regarded them as illegitimate hybrids with no proper name or significance in our law." Gregory and Katz, *Labor Law: Cases, Materials, and Comments* 1152 (1948).

> "To attempt to write about or state 'the law of the collective bargain' . . . is to attempt to write about or to state something which does not exist. True, there are cases, perhaps a hundred or so all told. But there is no body of doctrine, in any sense of the word to which reference can be made to predict the outcome of as yet unsettled questions. It can hardly even be said that there are standards, let alone a frame of reference." Witmer, *Collective Labor Agreements in the Courts* 48 Yale L.J. 195, 238-239 (1938).

See also Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572 (1931).

This, of course, is not surprising. During the period when the common law developed our present concept of contract, the institution of collective bargaining was unknown. A contract of employment, defining the relationship between master and servant, was known and the law, developed formulae which fitted the observed phenomena. Thus, the respective rights of employer and employee were defined by the terms of the individual contract of employment. There had to be consideration and a mutuality of obligation. Unless the employee agreed to work for a fixed period of time he could not object if he were discharged without cause. Furthermore, for reasons inherent in the nature of this relationship, such a contract would not be specifically enforced, except that, where unique services

were involved, injunction against employment elsewhere might be granted to the employer.[31]

The institution of collective bargaining simply did not fit into this conventional contractual conception. The contract terms which would govern the employment of those who came within the bargaining unit were contained in a contract with a union which did not agree to perform labor itself, or even, usually, to provide persons who would perform labor. Nor, on the other hand, did the employer agree that he would hire any particular employees or even that he would hire or retain any employees at all. Finally, the contracting party—the union—was not a legal entity at all. It was an association of employees but neither the contract nor the union's internal rules usually bound the individual members to work under the contract.

To a common law court the collective agreement was not a contract of employment and, hence, was not a contract at all.

> "It appears to their Lordships to be intended merely to operate as an agreement between a body of employers and a labour organization by which the employers undertake that as regards their workmen, certain rules beneficial to the workmen shall be observed. By itself it constitutes no contract between any individual employee and the company which employes him. If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by [the union] against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied." *Young* v. *Canadian Northern Railway* [1931] A.C. 83.

See also *Swart* v. *Huston*, 154 Kan. 182, 117 P. 2d 576 (1941).

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[11] Restatement, Contracts §§ 379, 380 (1932). These principles were applied to a collective bargaining agreement by the Supreme Court of Ohio in 1953. Masetta v. National Bronze & Aluminum Foundry Co., 159 Ohio St. 306, 112 N. E. 2d 15.

Other courts resorted to various theories in an attempt to find some method of giving enforceable rights to the employees covered by collective agreements. The union was regarded by some as acting as an agent for its members. The contract could thus be regarded as just a group contract of employment, the union's function being simply that of an agent, not a party in interest. Other courts regarded the collective bargaining agreement as establishing a usage, or a custom, or a mutual general offer, which was regarded as incorporated into the individual contracts of employment executed by the employees.

> ". . . in itself it can rarely be a subject of court action because it is incomplete. It establishes no concrete contract between the employer and any employee. No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer to be closed by specific acceptances." *Yazoo & M.V.R. Co.* v. *Webb*, 64 F. 2d 902, 903-904 (5th Cir. 1933).

In this view, also, the union had no contractual interest—the operative legal "fact" was the individual contract of employment. The development of the concept of the third party beneficiary contract provided still another formula into which the collective bargaining contract could be forced and many courts utilized it so as to permit individual employees to sue as the beneficiaries of the contract between the union and the employer.

All of these theories have obvious deficiencies. We will discuss some of them later in this brief. The question here, however, is only whether Section 301(a) should be construed as making them determinative of the nature of the basic legal rights created by a collective bargaining agreement. We think it is almost nonsense to say that when Congress declared that "statutory recognition of the collective agreement as a valid, binding and enforceable

contract is a logical and necessary step" it meant only to provide a federal forum in which to enforce the varying rights, if any, which might accrue to the parties under the confusing and conflicting theories which have been adopted in the various states. These theories, furthermore, do not take account of the policies and provisions relating to the establishment and conduct of the collective barganing relationship which are contained in the National Labor Relations Act (Title I of the Taft-Hartley Act), 29 U.S.C. §§ 151-168. Obviously those provisions must be taken into account in analyzing the nature of the individual and collective agreements made under the Act. *See J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). As Senator Taft said, it is impossible to separate them.

We conclude then that Congress at least intended that collective bargaining agreements made under the federal act "should be enforceable in the Federal Courts," consistently with the federal provisions governing the collective bargaining relationship. In the light of the variations in state law with respect to the very status of these agreements as contracts, the right conferred by Congress must comprehend not only access to the federal courts but also the right to assert there that the agreement sued upon is an enforceable contract as a matter of substantive federal law.[12]

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[12] There are a number of questions not directly presented here whose resolution may depend upon whether a collective bargaining agreement is regarded as a mutual general offer. an agreement made by an agent on behalf of the individual employees, a third party beneficiary agreement, or an enforceable contract *sui generis*. Is consideration necessary? If not, does the doctrine of failure of consideration apply so as to permit one party to avoid his obligations because the other party has breached his? Is an agreement by an individual to work for less than the amount specified in a collective bargaining agreement contractually valid? If not, can an individual employee settle a claim for the wages specified in a collective bargaining agreement for less than the amount claimed? Can a union execute a collective bar-

III—THE EXISTING THEORIES AND THE COURT OF APPEALS "ECLECTIC" THEORY OF THE COLLECTIVE BARGAINING CONTRACT ARE UNSATISFACTORY

It has become routine to express dissatisfaction with the various theories which the courts have used to encompass the institution of collective bargaining within the traditional concepts of the common law.[13] Even in the absence of Section 301 (a) it could sensibly be argued that the provisions of the National Labor Relations Act requiring collective bargaining and "the execution of a written contract incorporating any agreement reached,"[14] constituted a sufficient basis for re-evaluating the legal status of the collective bargaining agreement. Certainly the questions determined, before Section 301(a) was enacted, in such cases as *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), and *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), are relevant to the determination of the status of such agreements in breach of contract suits. In 1945, Judge Sparks thought that by the National Labor Relations Act "the

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gaining agreement giving away an individual employee benefit which has accrued by virtue of an earlier collective bargaining agreement? Does the settlement by a union of outstanding claims of violation of a collective bargaining agreement preclude individuals from reasserting their claims? May an employee assert a claim that the collective bargaining agreement has been violated without first exhausting the grievance machinery established under the contract?

All of these questions are questions of substance, whose resolution is indissolubly connected with the legal status to be attributed to the collective bargaining agreement. But they are also questions that cannot properly be decided independently of the provisions of the National Labor Relations Act.

[13] See, e.g., Gregory & Katz, *Labor Law: Cases, Materials and Comments*, 1152-1163 (1948); Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L.J. 195 (1938); Anderson, *Collective Bargaining Agreements*, 15 Ore. L. Rev. 220 (1936); Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572 (1931).

[14] Section 8(d). 29 U.S.C. § 158(d). See also 29 USC § § 158(a) and 159(a) and H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

Union was given the right in its own name to bargain, and contract, and as an entity to enforce such contract in courts of law." *Pullman Standard Car Mfg. Co.* v. *Local Union No. 2928*, 152 F. 2d 493, 498 (7th Cir. 1945) (dissenting opinion). Now, however, we have a Congressional command that the collective bargaining agreement be recognized "as a valid, binding and enforceable contract." All the more reason, therefore, for re-assessing existing doctrine.

1. ***The Older Theories.***

The view, typified by *Young* v. *Canadian Ry. Co.*, *supra*, that the collective bargaining agreement can create no actionable rights in either the union or the employee must, by hypothesis, be rejected.

The usage or custom theory, probably the most widely accepted of the older theories, did give some contractual force to the collective bargaining agreement, although indirectly. The collective agreement was not considered as itself a contract, but its terms were made enforceable by regarding them as a usage incorporated in the individual contract of employment. An employee who was not paid in accordance with the agreement or who was denied some right, such as seniority, provided for in the agreement thus had an enforceable claim against the employer based not on the collective bargaining agreement, but on the individual contract of employment incorporating that agreement.

> ". . . we now enter into a consideration of the contract that did exist between appellant and the railway company. . . . That contract was between the union and the railway company alone. . . . Having been signed by appellee, it is evidence of its intention, in the conduct of its business with enginemen on said division, to be governed by the wages and rules, and for the time therein stipulated. . . . There is on its face no consideration for its execution. It is therefore not a contract. It is not an offer, for none of its terms

> can be construed as a proposal. It comes squarely within the definition of usage as defined in *Byrd* v. *Beall*, 150 Ala. 122, 43 South, 749, 124 Am. St. Rep. 60. . . . It follows, therefore, that all appellee assented to in signing that agreement was that it would adopt and maintain the rates of pay and regulations, and for the period of time, therein stipulated, in its dealings with enginemen employed by it on its Chattanooga Division of its railway.
>
> "If appellant, during the time limit provided in said agreement, entered the service of appellee as engineman on its Chattanooga Division, knew and assented to the provisions of said agreement, or if they were so generally known among enginemen as to justify the presumption that he did know them, and made no express contract in conflict with any of its provisions, the agreement in question entered into and became a part of his contract with appellee, as if fully incorporated therein." *Hudson* v. *Cincinnati*, N.O. & T.P. Ry. Co., 152 Ky. 711, 714-717, 154 S.W. 47, 48-50 (1913).

See also *Illinois Central R. Co.* v. *Moore*, 112 F. 2d 959 (5th Cir. 1940) *revd.* 312 U.S. 630; *Yazoo & M.V.R. Co.* v. *Webb*, 64 F. 2d 902 (5th Cir. 1933).

As the Court below pointed out, the usage or custom theory had the obvious deficiency that it assumed the necessity of showing that the employee had knowledge, or reason to know, of the usage or custom.[19] (R. 101.) Furthermore, the theory "must view the collective agreement as not a contract at all," (R. 100) and this contradicts the hypothesis upon which Section 301(a) is based.

The agency theory, too, cannot stand careful analysis. It is typified by the language of the Minnesota Supreme Court in *Mueller* v. *Chicago & N.W. Ry. Co.*, 194 Minn. 83, 85, 259 N.W. 798, 799 (1935):

> "But it is plain that, the contract having been made by the representatives of the brotherhood on behalf

[19] Is this necessarily true of a custom, as opposed to a usage? See Rice, *op. cit. supra*, note 13.

> of the 'employees in train, engine and yard service,' plaintiff is entitled to sue on the contract as one made in his behalf by a duly authorized agent; that is, this suit must be considered as one by a party to, rather than by a mere beneficiary of, the contract."

and the language of a recent New Jersey case:

> "A collective bargaining agreement is the joint and several contract of the members of the union made by the officers of the union as their agents." *Kennedy* v. *Westinghouse Electric Corp.*, 25 N.J. Super 601, 603, 96 A. 2d 720, 721 (1953), *revd. on other grds.* 29 N.J. Super. 68, 101 A. 2d 592 (1953).

This theory does not explain how the contract is applicable to non-members of the union (although this perhaps could be remedied by construing the Act as conferring a statutory agency on the union to represent all the employees in the bargaining unit.) Furthermore, an employee who had revoked the agent's authority to represent him, would not be bound by an agreement reducing an individual benefit accrued under an earlier agreement. Compare *Piercy* v. *Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923) with *Hartley* v. *Brotherhood of Railway Clerks*, 283 Mich. 201, 277 N.W. 885 (1938). And an individual who contracted directly with the employer for a wage less than that prescribed in the union contract would be bound by his personal agreement. Compare *Langmade* v. *Olean Brewery Co.*, 137 App. Div. 355, 121 N.Y. Supp. 388 (4th Dept. 1910) with *Elrod* v. *Luckenback Steamship Co.*, 28 LRR Man 2046 (N.Y. City Ct., 1951). This, too, could perhaps be remedied by construing the federal act as vesting in the union an exclusive agency which no individual could revoke, or waive. But, once we do this, the agency concept becomes entirely fictional.

Apart from these considerations, the agency theory rests on the misconception that the collective bargaining agreement is a contract of employment.

> "Whether it be a contract between the defendant

and one employee or a large group of employees, it is still an employment contract and must be construed and enforced in accordance with the well-established law relating to employment contracts." *Masetta* v. *National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 311, 112 N.E. 2d 15, 18 (1953).

But, as has been frequently pointed out in the cases adopting the usage theory and by this court,[15] the collective bargaining contract is not a contract of employment at all. The employer does not agree to hire anyone and the union does not agree, on behalf of anyone, that he will work. Even under the older agreements (now illegal by virtue of Section 8(a)(3) of the Taft-Hartley Act)[16] under which unions agreed to furnish members who would work,[17] the employer-employee relationship was established by the individual action of the worker and the act of hiring by the employer. Collective bargaining agreements "neither create the employment relationship nor do they deal exclusively with it." Lenhoff, *The Present Status of Collective Contracts in the American System*, 39 Mich. L. Rev. 1109 (1941).[18]

Unlike the two theories already discussed, the third party beneficiary theory rests on a recognition that the collective bargaining agreement is a valid contract and that the union is a party to it in its own right. In some states which have adopted this theory, the use of the third party

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[15] J. I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

[16] 29 U.S.C. § 158(a)(3). See, e.g., Daniel Hamm Drayage Co., 84 NLRB 456 (1949) *enforced*, NLRB v. Daniel Hamm Drayage Co., 185 F. 2d 1020 (5th Cir. 1951).

[17] *E.g.*, Goldman v. Cohen, 222 App. Div., 631, 227 N.Y. Supp. 311 (1st Dept. 1928); Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 So. 887 (1936); American-Hawaiian S.S. Co. v. Sailors Union of the Pacific, 37 F. Supp. 828 (N.D. Cal. 1941).

[18] Writing in 1941, Professor Lenhoff states as already achieved by the law a recognition of the union's interest in enforcing all of the provisions of the collective bargaining agreement. The cases, unfortunately, do not fully support his optimistic account.

beneficiary notion followed recognition of the right of the union itself to sue for enforcement, even as to wage scales. *Schlesinger* v. *Quinto*, 201 App. Div. 487, 194 N.Y.S. 401 (1st Dept. 1922); *Hudak* v. *Hornell Industries*, 304 N.Y. 207, 106 N.E. 2d 609 (1952); *but cf. Kaufman* v. *M. T. Davidson Co.*, 22 LRR Man. 2531 (N.Y. Sup. Ct. 1948).

In a sense it is true, perhaps, that the individual employee derives benefits from the collective agreement "somewhat as a third party beneficiary." But, as the court below implied, to label the collective agreement a third party beneficiary agreement in the conventional sense, is highly misleading. Certainly we do not have the conventional third party beneficiary situation where one party to a contract supplies consideration to the other, in return for which the other contracting party agrees to provide benefits to some third person. The employee who works under a collective bargaining agreement cannot reasonably be described as a creditor beneficiary, and it is hard to conceive of the wages paid to him as being a gift to a donee beneficiary rather than as a return for the labor performed. Cf. Restatement, Contracts (1932) § 133. The employee is not a beneficiary at all but, simply, a worker whose employment, and compensation for work performed, is governed by the collective bargaining agreement which his union has negotiated.

The third party beneficiary theory, furthermore, may run into some of the same difficulties as the agency theory.

> "After a contract for the benefit of a third person has been accepted or acted on by such third person beneficiary, the contract cannot be rescinded by the parties without his consent: It follows, as an immediate corollary, that such third party beneficiary cannot be compelled to accept or act on the contract made for his benefit. He may forego his opportunity for benefits under that contract and continue to work under another agreement with his employer and accept the compensation stipulated in that agreement."

Huston v. *Washington Wood & Coal Co.*, 4 Wash. 2d 449, 452, 103 P. 2d 1095, 1097 (1940).

Cf. *McDonald* v. *Wockner*, 267 P. 2d 97 (Wash., 1954) ("Anti-Kickback" statute).

2. The "Eclectic" Theory.

After reviewing these older theories, the court below rejected them and announced its own, which it termed "eclectic." (R. 100.) Essentially this theory involved adoption of the usage-custom theory, but substitution of the National Labor Relations Act for the usage or custom. Under the National Labor Relations Act, it is clear that the collective agreement covers all employees for whom the union is the statutory bargaining representative. Hence, the court below said, the terms of the collective agreement are incorporated into the individual contracts of hire not because of custom or usage but "because the law says so." (R. 101.)

The second difficulty with the usage theory—the absence of any contract with the union as such—the court met by dividing the collective agreement into two parts: those provisions dealing with subjects such as wages and hours which provide a "direct benefit to the individual" (R. 103) and those, dealing with such matters as "lockout, union shop, arbitration, and safety conditions" (R. 103), which provide benefits running in favor of the union as such. The second category, comprising the benefits running to the union, made the agreement into a contract, the union's promises—primarily the promise to refrain from conducting strikes—furnishing the consideration for the employer's promise to confer benefits directly upon it.

The fallacy of this separation of the collective agreement into two parts is made plain by the court's own examples. The benefit of a provision relating to arbitration obviously "runs in favor of" the individual employee just as much as does the contract section on which the individual grievance to be arbitrated is based. Provisions relating to "safety conditions" surely cannot be described as for the union's

benefit and only "incidentally" for the benefit of the employees. An employee who is locked out, or whose shop has run away, would be surprised to learn that this is only of incidental interest to him. Most of these provisions, in fact, have been made the basis for suits by individual employees as beneficiaries of the collective bargaining agreement.[20]

The only provision in the usual collective bargaining agreement which can be even argued to "run only to the benefit of the union and . . . not to the benefit of the individual employee" (R. 103) are those dealing with the union shop and the checkoff. (And where there is a union shop, the checkoff is a direct benefit to the individual employees. See Appendix A of this brief, p. 67.) Essentially then, the "eclectic theory" rests on a conception of the collective bargaining agreement as a bargain between the union and the employer, pursuant to which the union makes certain promises to the employer and those promises furnish consideration only for the employer's promise to enforce the union shop. If we disregard the other examples cited by the court of appeals, this is almost precisely what it said. (R. 103-104.)

The underlying factual assumption that a union makes its deal, gets a promise for dues, and silently steals away, to appear again only at the next contract negotiation, is completely false, as we shall demonstrate later. But even if it were true in some cases, this view can hardly pass muster as a theory of collective bargaining contracts unless it can be said that union security provisions are an essential element of every collective bargaining agreement. And this, of course, is untrue on its face. Many collective

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[20] See, *e.g.*, Tennessee Coal, Iron & R.R. Co. v. Sizemore, 258 Ala. 344, 62 So. 2d 459 (1952) (safety provision); Faultless Caster Corp. v. United Electrical Workers, 119 Ind. App. 330, 86 N.E. 2d 703 (1949) (lockout; individual co-plaintiffs). *Cf.* Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S. 2d 709 (3d Dept. 1954 *aff'd.* 306 N.Y. 966, 120 N.E. 2d 227 (1954) (arbitration).

bargaining agreements do not contain such provisions. The duty to bargain collectively, set forth in Section 8(d) of the Act,[21] speaks of bargaining about "wages, hours and other terms and conditions of employment." The National Labor Relations Board, in describing the basic elements in a collective bargaining agreement, did not even specifically mention union security provisions. National Labor Relations Board, *Written Trade Agreements in Collective Bargaining* (1939) 39-41 (reproduced as Appendix B to this brief). And the contract here sued upon does not contain a union security provision.[22] Surely, a collective bargaining agreement does not cease to be such or fail for lack of consideration if it omits such a provision.

The separation made by the Court of Appeals does not, in short, help to solve the problem which the Court posed —the reciprocal rights and duties of the three groups concerned in a collective bargaining contract—since it finds the essence of the contractual relationship in portions of the contract which are not essential to it.

It is possible, however, to disregard this aspect of the Court's opinion and, addressing ourselves directly to its treatment of the employee benefit provisions of the agreement, to find a contractual theory. This theory is that the collective bargaining agreement constitutes a promise by the employer to agree in turn with the employees to accord them the specified benefits in return for their labor. The collective bargaining agreement is thus a contract, and perhaps an enforceable one, but only a contract to insert certain provisions in the individual contracts of hire. Except that it is automatically applicable to the employees and presumably cannot be revoked, the contract is the

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[21] 29 U.S.C. § 158 (d).

[22] It does contain a checkoff provision but that provides that dues are to be checked off only pursuant to written and revocable authorizations by the employees (R. 11). The union thus has no contractual right of its own to receive any dues beyond those which the employees individually contract to pay.

same as Judge Sibley's "mutual general offer"[23] and follows almost explicitly the 1913 theory of the Supreme Court of Kentucky, quoted *supra* at pp. 26-27.

This theory, if it is correct, would presumably give the union a cause of action if the employer attempted openly to violate the collective agreement by hiring at less than the specified rate or by executing individual agreements otherwise at variance with the collective agreements. But simple failure to perform, whether deliberate or due to a dispute as to the meaning of the collective agreement, would give rise only to a cause of action in the affected employees.

The theory has a certain superficial attractiveness. It is neat. It accounts for most of the conceptual objections to prior formulations. We have recognition, of a sort, of the collective agreement as a contract. We also have recognition that it is not a contract of employment and that the wages and other benefits prescribed in it are only payable to the employees as a result of their taking jobs which the employer is free to provide or not. By regarding the collective agreement as a contract to incorporate the specified terms in the individual contracts of employment most of the difficulties of the agency and third party beneficiary theories are overcome. Presumably, the individual contracts would be deemed to incorporate the provisions for change or termination set forth in the collective agreement so that changes in wage rates, etc., in that agreement after the initial hiring would be regarded as automatically inserted in the individual contracts.

Although the individual contracts which the theory posits are almost entirely fictional, the model is not internally inconsistent. It violates no generally accepted propositions of law. And it appeals, perhaps, to lawyers

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[23] Yazoo & M. V. R. Co. v. Webb, 64 F. 2d 902, 904 (5th Cir. 1933).

who are otherwise unable to account in conventional terms for the phenomenon known as the collective bargaining agreement.

There is only one difficulty—the theory does not fit the phenomenon. It misses, in fact, the essential attributes of the institution which it is supposed to describe. Only those without any knowledge of the facts of collective bargaining could say, of this theory: "So it is in the shop." (R. 101.)

We turn now to an examination of these facts.

IV—THE NATURE OF THE COLLECTIVE BARGAINING PROCESS REQUIRES THAT THE UNION BE REGARDED AS HAVING A CONTRACTUAL INTEREST IN THE PERFORMANCE OF THE COLLECTIVE AGREEMENT.

1. *The Nature of the Collective Bargaining Process.*

A reading of the cases dealing with collective bargaining agreements makes it clear that all of them, in some measure, rest upon some preconception of the nature of the collective bargaining process.[23a] In making our argument here, therefore, we thought it would be useful to present to the Court an economic analysis of the nature of the collective bargaining process, as it has developed under the National Labor Relations Act. That analysis, which has been prepared by an authority in the field and which draws upon the published works of other recognized authorities, is attached to this brief as Appendix A. In addition, we have printed as Appendix B a portion of a 1939 study by the National Labor Relations Board entitled "Written Trade Agreements in Collective Bargaining," and, as Appendix C, we have photographically reproduced the descriptive introductory portion of the Bureau of Labor Statis-

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[23a] E.g., Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 152 Ky. 711, 1545 W. 47 (1913); Yazoo & M. V. R. Co. v. Webb, 64 F. 2d 902 (5th Cir., 1933); Yazoo & M. V. R. Co v. Sideboard, 161 Miss. 4, 133 So. 699 (1931).

tics' Bulletin No. 908-16, entitled "Collective Bargaining Provisions: Grievance and Arbitration."

From these materials, and from the provisions of the National Labor Relations Act and the decisions under it, we think it is proper to draw certain conclusions, which we will set forth here summarily.

Congress has declared that unions selected by a majority of employees for the appropriate units shall be the exclusive representative of employees for the purpose of collective bargaining.[24] The concept of collective bargaining is not limited to the negotiation of a formal collective bargaining agreement. To the contrary, the collective bargaining relationship is a continuing one. Under the Wagner Act it included bargaining during the term of an agreement concerning proposed changes in that agreement.[25] Since the Taft-Hartley amendments, the collective bargaining during the term of an agreement must assume as its fixed premise that there shall be no changes in the terms of the agreement.[26] This does not mean, however, that collective bargaining does not exist during the contract term. To the contrary, there is a permanent organized relationship between the union and management constituting a system of day-to-day private industrial government. And the statute expressly recognizes that collective bargaining includes the negotiation of questions arising under the agreement.[27]

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[24] 29 U.S.C. § 159(a).

[25] NLRB v. Sands Mfg. Co., 306 U. S. 332, 342 (1939); NLRB v. Newark Morning Ledger Co., 120 F. 2d 262, 267 (3rd Cir. 1941); Lone Star Gas Co., 18 NLRB 420, 444 (1939).

[26] 29 U.S.C. § 158 (d). See Allied Mills Inc., 82 NLRB 854 (1949).

[27] ". . . to bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement, *or any question arising thereunder*. . . ." 29 U.S.C. § 158(d) (emphasis added).

The formal collective bargaining agreement represents a settlement in outline of the basic constituents of the permanent day-to-day relationship. But this settlement cannot possibly deal with the myriad details of actual application; it acquires meaning and content only by virtue of a process of administration and interpretation. In this process management is necessarily the moving party in the first instance—it applies the agreement by hiring, firing, directing the working forces and paying wages. But the union participates actively in the process through the filing and processing of grievances claiming that management's actions violate the agreement. It is in the processing, adjustment and settlement of these grievances that the continuing collective bargaining relationship takes place.

In the typical collective bargaining agreement—as in the agreement involved in this case—the steps in the grievance procedure after the initial complaint are taken by the union. The union's actions in taking these steps are part of its statutory responsibility as the collective bargaining representative. As stated in *Hughes Tool Co.*, 104 NLRB 318, 326 (1953):

> "The prominent part which grievance handling plays in the representation of employees is readily apparent. As the Board has stated previously, 'Grievances are usually more than mere personal dissatisfactions or complaints of employees and their adjustment frequently involves the interpretation and application of the terms of a contract or otherwise affects the terms and conditions of employment not covered by a contract.'[18] The adjustment of grievances, viewed in the larger aspect, constitutes, to a great degree, the actual administration of a collective-bargaining contract.
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> "The importance of grievance presentation and

"[18] Bethlehem Steel Company, Shipbuilding Division, 89 NLRB 341 at 344.

adjustment as a part of the representation of employees is also noted in the statute. Section 2(5) of the Act observes that a labor organization exists for the purpose, among others, of dealing with employers concerning grievances.[19] Section 9(a), as will be more fully discussed hereinafter, specifically recognizes the critical position grievance presentation and adjustment occupies in the relationship between the employee and the employer, the representative and the employer, and the employee and the representative. We find, therefore, in accord with the views of the Fifth Circuit court that 'The handling of grievances . . . is part of the business [a certified union] has assumed and must be done with impartiality.' "[20]

"[19] Section 2(5) states. in full, 'the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with emloyees concerning grievances, labor disputes, wages. rates of pay, hours of employment, or conditions of work.'

"[20] Hughes Tool Company, v. NLRB, 147 F. 2d 69 (C.A. 5, 1945), dealing with the issues of whether an employee may call in a representative other than the certified union to represent him in grievance procedures and the scope of the certified union's right to participate in presentation and adjustment of grievances brought by individuals. At the Board hearing, however, an offer of proof to the effect that the certified union had refused to handle grievances filed by members of other unions was rejected. On this subsidiary point the court noted that 'We think a meritorious grievance is entitled. if desired, to the aid and countenance of the bargaining representative. If the griever is a member of another union and cannot be represented by his own union, it is the more necessary that he have the aid of the representative.' On the same point, the court added, 'When the [certified union] accepted certification as the bargaining representative for the group, it accepted a trust. It became bound to represent equally and in good faith the interests of the whole group [citing the Steele case, *supra*] . . . It ought not discriminate in the execution of its duties between its own members and employees who belong to another union or to no union'."

Congress has specifically dealt with the relationship of the individual employee to the grievance procedure. In

Section 9(a) of the Act, as amended in 1947, it provided that an employee should have the right to present his grievance individually and have it adjusted, but this right was expressly subjected to two conditions: (1) the adjustment must be consistent with the collective bargaining agreement and (2) the union must be given an opportunity to be present.[28] As the Board has said, Congress thus balanced the individual's interest with "the representative's interest in preserving intact the terms and conditions of its contract and its right to bargain about such terms."[29]

As a final step in the continuing collective bargaining relationship there may be provision for the arbitration of disputes which are not resolved in the grievance procedure. Here again the union is the protagonist, on one side of the table, in a proceeding which determines and defines the rights of the employees.

2. *The Contradiction between the Decision of the Court Below and the Collective Bargaining Process.*

If the propositions we have set forth above are accepted, and we do not believe that they are susceptible of substantial dispute, it is immediately apparent that the "contract to make a contract" theory of the court below is based upon a fundamenal misconception of the collective bargaining process.

In the court's view, the union has completed its function as the bargaining representative of the employees when the formal agreement is signed. It has no further legal interest as a party except with respect to the provisions providing benefits directly to it. The relationship between the employees and the employer during the term of the agreement is governed by the individual contracts of hire. Although those individual contracts are deemed by the law to include the benefits specified in the union's con-

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[28] 29 U.S.C. § 159(a).

[29] Hughes Tool Co., 104 NLRB 318, 327.

tract, they stand separate and apart from it. If a dispute arises as to whether the proper wages or other benefits have been accorded, that dispute is a dispute between the individual employee and the employer. If they are not able to resolve the dispute and a suit is brought, the employee and only the employee has a legal interest sufficient to bring such a suit.

This conception obviously cannot square with the practice of collective bargaining or with the law governing it. Once we accept, as we must, the proposition that collective bargaining is a continuing process, and that the settlement of grievances is part of that process, then the legal requirement that in collective bargaining the union chosen by the majority is the exclusive representative of all necessarily excludes the view that the individual employee owns, and owns exclusively, the right to bring suit upon his grievance.

For a suit for breach of contract is, in essence, the same thing as a grievance. In form, both are complaints that the employer has breached his agreement; but in reality both perform the function of resolving disputes as to the proper interpretation and application of the agreement. A legal theory that excludes the collective group—the union—from the suit at law is, we believe, incompatible with a system in which the collective group participates, and indeed controls, the processing of a grievance.

The incongruity of the legal analysis of the court of appeals is made plain when we consider in detail the interrelationship between the suit at law and the grievance procedure. Is the suit an alternate, or a complement, to the grievance procedure? That is, should exhaustion of all of the steps of the grievance procedure be required as a necessary preliminary to legal action by a union or an employee for breach of the collective agreement? Although the cases arising under state law are in conflict on this

question,[30] we think the answer is plain that exhaustion of administrative remedies is required.[31] Conceptually, this follows from the fact that the very collective bargaining agreement which specifies the rights to be accorded the employees also specifies the procedure to be followed in adjudicating any dispute as to these rights. Under any legal theory of the collective bargaining agreement, the first can stand no higher than the second. Examination of the institution of collective bargaining leads to the same result. The law governing day-to-day relationships between employer and employee is developed, as we have shown, through the grievance procedure. It constitutes the accepted method by which the broad terms of the agreement are related to specific events occurring in the plant. To hold that this machinery can be ignored and suit brought on the bare terms of the contract would not be to enforce the relationship which the parties have agreed upon but to disrupt and perhaps destroy it.

Let us examine the consequences of this view. If the lawsuit is a complement to the grievance procedure, it cannot be held the right asserted in that lawsuit is a right arising solely out of the individual's contract of employment and independent of the union's rights under the collective agreement. For so to hold would be to attach to the tail end of a process a set of legal values wholly at variance with those that prevail during the process. At all stages of the grievance procedure settlements and agree-

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[30] Compare, *e.g.*, Dufour v. Continental Southern Lines. 68 So. 2d 489 Miss. (1953), and Latter v. Holsum Bread Co., 108 Utah 364, 160 P. 2d 421 (1945), with Pettus v. Olga Coal Co., 72 S.E. 2d 881 (W. Va. 1952), Hudak v. Hornell Industries, 304 N. Y. 207, 106 N. E. 2d 609 (1952), and Taschenberger v. Celanese Corp., 34 LRR Man 2305 (Md. Circuit Ct., 1954).

[31] This Court has so held with respect to suits involving interpretation of a collective bargaining contract under the Railway Labor Act. Slocum v. Delaware L. & W. R. Co., 339 U. S. 239 (1950). In discharge cases, state law governs. Transcontinental Air v. Koppel, 345 U. S. 653 (1953).

ments are reached. Indeed, that is the very purpose of setting up a procedure with a number of steps. Some settlements are made by compromise. In others the grievance is granted by the employer. In still others the union concedes that the employer s action was proper under the contract. All of such settlements are made by the union as the chosen, and exclusive, collective bargaining representative of the employees. Its right to make such settlements must be assumed to be as broad as its right to make other agreements [32] (and to be subject to the same qualifications[33]). But if this is so, then the right to bring a lawsuit after the grievance procedure is exhausted arises not only from the individual contract of employment but also from the union's action in processing the grievance.[34]

If we assume the opposite view—that a suit can be maintained without exhausting the grievance procedure—we come to the same result. In this view, the suit at law is an alternate method of processing a grievance. But if we hold that the individual has the sole right to maintain and conduct the law suit we immediately contradict the basic premise of the National Labor Relations Act. For this would mean that he could adjust his grievance, via a law suit, without the presence of the collective bargaining representative[35] and even though the result might be inconsistent with the meaning of the basic agreement, as both of the parties who negotiated it have interpreted it. This

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[32] *Cf.* Justice Frankfurter's statement, in dissent, with respect to the railway industry that "the whole course and current of the . . . trade union relationships imply that the interest of the individual member as to issues arising under the collective agreement is entrusted to his chosen representative." Elgin, J. & E. R. Co. v. Burley, 327 U.S. 655, 676 (on rehearing, 1946).

[33] See Steele v. L. & N. R. Co., 323 U. S. 192 (1944); Ford Motor Co. v. Huffman. 345 U. S. 330 (1953).

[34] A graphic illustration is provided by the holding in Trimble v. Robertshaw Thermostat Co., 73 D. & C. 239, 31 West. 283 (1949).

[35] See, *e.g.* Nichols v. National Tube Co., 34 LRRM 2183 (D.C., N.D. Ohio 1954).

flies directly in the face of Section 9(a) of the Act. Finally, it would mean that an employer, in disagreement with a union, could bargain out a settlement of a law suit which would provide different benefits than those provided for in the agreement. But this is scarcely consonant with the established rule that the employer may not make individual wage agreements with the employees in derogation of the collective bargaining agreement. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944).

We conclude, then, that the conception of the court below—that the right to receive the benefits specified in the collective bargaining agreement derives solely from the individual contract of employment, incorporating the terms of the collective agreement, and that the union merely contracts that he shall have that individual right—contradicts the basic premise of the collective bargaining relationship prescribed by the Act.

3. *The Legal Interest of the Union.*

The purpose of the argument above was to show the error of the theory that assigns to the individual employee the sole legal interest in the enforcement of the employee benefit provisions of the collective agreement. It necessarily follows from that argument that the union must be regarded as having a separate and distinct legal interest in such enforcement.

This legal interest is of two kinds. First, there is the union's statutory interest in the proper interpretation of the agreement. This interest goes beyond the particular employees involved. Each grievance, each arbitration and each lawsuit necessarily establishes precedent in the interpretation of the agreement which will have an effect on the whole group represented by the union. The Court of Appeals expressed a sense of shock because the effect of permitting the union to sue here might be to secure an interpretation of the agreement which would bind the individual employees, particularly if the union lost on the

merits. (R. 105.) But this hardly seems shocking, since the union is not only charged with the responsibility of negotiating the contractual terms for the individuals in the first place, but also charged with the responsibility of negotiating concerning their interpretation. What is shocking is the converse. If the union has no right to sue, then the individual employee who does sue will, in effect, bind the collective group by obtaining a judicial determination of the meaning of the contract.

Even where there is no question of interpretation involved, the union has a distinct interest in the enforcement of the collective agreement. Any violation of the agreement constitutes an injury to the collective group which is in addition to, and apart from, the damage suffered by the individual employees affected.

This is so because one of the essential benefits which the employees as a group obtain from the collective relationship is the substitution of a rule of law for the possibility of arbitrary action. A provision in a collective agreement defining the requirements for receiving, say, holiday pay does more than give a particular individual the right to receive such pay. It establishes the principle that those who meet the conditions shall receive the benefit and those who do not will not. The rule is to be the same for one employee as the next and it is to be the same on one holiday as the next.

The benefits of the rule of law established by the collective agreement are not one-sided. It fixes the employer's liability for the duration of the agreement with respect to the items covered in the contract. In addition, it places the responsibility for the denial of claimed benefits in particular cases upon the agreement which has been accepted by the group. An employee who claims that, in all fairness and justice, he should receive an increase in wages for the work he is doing or more pay for holiday work, is politely—and properly—referred to the bargained settle-

ment of those issues contained in the collective agreement.

When an employer violates the collective agreement, he does more than damage the particular individual involved. He violates the rule of law established by the agreement and he deprives the group as a whole of one of the benefits for which it has bargained. The union in bringing suit to redress the individual's grievance is thus also bringing suit to obtain the *quid pro quo* for which it has contracted.

The matter can be put in the terms suggested by the court of appeals. When an employer executes a collective bargaining agreement he does not promise the union merely to include the specified provisions as a term of each individual contract of employment. He promises, rather, that in his employment of individuals he will uniformly observe and abide by certain agreed upon rules. Those rules may also constitute the terms of the individual contracts of employment. But that is not just what the union bargains for. It also bargains, in the words of the contract here, for a commitment "to administer the provisions of this Agreement in good faith" (R. 9).

V—SECTION 301 REQUIRES THAT THE UNION BE GIVEN THE RIGHT TO SUE HERE

Our argument thus far as to the nature of the collective bargaining relationship would be sufficient, we believe, to justify a common law court of general jurisdiction in coming to the conclusion, as some have, that a union has a sufficient legal interest in the collective agreement to bring suit to enforce it. But here we have a specific statutory mandate. And that, we submit, should remove any doubt.

1. *The statutory language and history.*

Congress did not, in Section 301, enact a theory of collective bargaining contracts. It left the theory to the courts. As we have already pointed out (*supra*, pp. 18-20) it said simply that it wanted to accomplish "statutory rec-

ognition of the collective agreement as a valid, binding and enforceable contract."[36] To do this, it provided in subsection (a) of 301, that the federal courts should have jurisdiction over all suits for breach of contracts between unions and employers subject to the Act. Section 301 (a) we think is sufficient to establish that the union may sue to obtain redress for breach of any of the provisions of the collective bargaining agreement. In so doing it vindicates its own interest in securing performance of the promises which the employer has made to it.

But if there were any doubt, the very next subsection—Section 301(b)—should set that doubt at rest. 301(b) gives the union the right to sue to vindicate the individual rights of the employees arising out of the collective agreement. It does not just say that a union may sue as an entity in the courts of the United States. That would give it legal capacity to appear for its members only. It says that the union may sue as an entity "and in behalf of the employees whom it represents."

We need not contend that this provision constitutes the union as the agent *ad-prosequendum* of the employees for all purposes. Cf. *Rock Drilling, etc., Hod Carriers' Local Union No. 17* v. *Mason & Hanger Co.*, 90 F. Supp. 539 (S.D. N.Y. 1950). We think that what it means is that in the collective bargaining area—the area in which the union chosen by the majority of the employees is elsewhere in the statute given exclusive authority to represent all of them—it shall also have authority to sue on their behalf. This must mean, if it means anything, that the union is given authority to seek redress for the failure of an employer to pay to the employees the salaries promised in the collective bargaining agreement.

2. *The Practical Effect of the Decision Below.*

A decision that unions may sue under Section 301(a)

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[36] Senate Rept. No. 105 on S. 1126, 80th Cong., 1st Sess. 17 (1947).

only for benefits running to them "as such" deprives the section of much of its usefulness. If the Court of Appeals is right, almost half of all the cases which have been brought in the federal courts under Section 301(a) should have been dismissed on jurisdictional grounds. It is, of course, impossible to make an accounting of every case which has been brought under the section, but there are a sufficient number of reported decisions so that an accurate estimate of the frequency of various kinds of suits filed under the section can be made.

We have attempted to examine every reported decision in which a suit for breach of contract under Section 301(a) was involved. We have been able to find 65 different cases. The distribution of these cases is, perhaps, surprising. In 25 cases, suit was brought by the employer against a union. In most of those the breach alleged was a strike in violation of a no-strike clause. In 2 cases, suit was attempted to be brought, unsuccessfully, by individual employees. In one case, one union sued another. The number of cases brought by unions far outshadowed the other categories. Unions brought 37 cases against employers. The decisions are listed, by category, in Appendix D of this brief.

The great majority of cases brought by unions arose from the alleged failure of the employer to accord to employees benefits claimed due under the collective bargaining agreement. In only 7 of the 37 cases in which unions were plaintiffs was the issue solely whether the employer had failed to provide the contracted for benefits to the union, and in 4 of those cases the benefit involved was payment to a welfare or sick benefit fund. In the three other union benefit cases the controversy arose not because of any employer reluctance to perform but because of a controversy as to which of two contesting unions was entitled to the check-off and recognition. In addition to these 7 "union benefit" cases, there were 3 others in which

the issue was whether the entire collective bargaining agreement was still in effect. In the remaining 25 cases[37] the root of the controversy was the alleged failure of the employer to accord rights specified in the collective agreement to an employee or employees.

These figures do not, of course, prove that the courts should have taken jurisdiction in these 25 cases. They do show, however, that the practical effect of the decision below would be to eliminate from the scope of the section a major area of its usefulness and the principal area in which it provides benefits to employees. The result would be virtually to convert Section 301(a) from a section providing that collective bargaining contracts shall be "equally . . . enforceable"[38] to a section providing that they shall be enforced solely against unions.

CONCLUSION

For the reasons above stated, the judgment of the Court of Appeals should be reversed and the cause remanded to that Court for a determination as to whether the action of the District Court in dismissing the complaint on the merits was proper.

Respectfully submitted,

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[37] In two cases, the nature of the basic controversy was not stated in the reported opinion.

[38] Senate Rept. No. 105 on S. 1126, 80th Cong., 1st Sess. 15 (1947).

APPENDIX A

THE STRUCTURE OF THE COLLECTIVE BARGAINING PROCESS*

INDEX—SUMMARY

Page

I. This analysis attempts to set forth the content of the collective bargaining process and the nature of the interrelationships between (a) the union and the employer, (b) the union and the employee, and, (c) the employee and the employer 52

II. Collective bargaining is accepted and encouraged as a matter of public policy, particularly in the Labor-Management Relations Act, 1947 52

III. The primary relationship established by collective bargaining is between union and employer and not between management and the individual workers. The majority rule principle of the Wagner Act and the Taft-Hartley Act are legislative affirmations of the existence of this primary relationship 53

IV. Collective bargaining is an integrated and continuing process which typically consists of the following links: 57

A. The negotiations phase, which is dependent on the later phases for the implementation of the intent of the parties 59

B. The grievance adjustment phase which is characterized by:

1. Accepted patterns as to structure and function 60
2. Its indispensability in the collective bargaining process 61
3. Systematic administration and rule-making 62
4. The paramount right of the bargaining agency as the spokesman for the employees 62

C. Arbitration of Grievances 64

D. Enforcement interests of the union generally 65

V. Some theories as to the place of enforcement in the collective bargaining processes can be subjected to criticism on the following grounds:

A. These theories seek to compartmentalize the provisions of the collective agreement as between

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Author, *Labor Unions in Action* (1948); *Unions and Telephones* (1952); *"Ideology and the Unions"*, 33 American Economic Review 868 (1943); "Ethnic Factor in the Development of the American Labor Movement" in Industrial Relations Research Association, *Interpreting the Labor Movement* (1952); U.S. Senate Subcommittee on Labor and Labor-Management Relations, 82nd Congress, 2nd Session, (staff report) *The Problem of Delay in Administering the Labor-Management Relations Act* (1952).

Page

those which benefit the individual employee and those which benefit the union. This compartmentalization is wrong in theory and practice as is revealed by an examination of specific provisions (by way of illustration) which are supposed to run only to the benefit of the union:

1. The checkoff provisions of the contract offer distinctive benefit to employees 67
2. Union shop provisions protect employee security and have been approved by overwhelming majorities in government conducted polls 68
3. Grievance arbitration confers substantial benefits on employees 69
   a. The overwhelming number of grievances arbitrated are *personal* grievances of employees 69
   b. Many employee grievances would in fact be unenforceable if arbitration were not available 71
   c. Grievance arbitration provides a large measure of assurance that individual grievances will not be settled on an *ex parte* basis 72
4. By the same token the union as a union has a vital interest in compliance with the wage provisions of the contract which in the disputed theory are presumed to be of interest only to the employee. The most important of these is the interest of the union (and the employer too) in standardization of wage conditions within a plant and between plants. An individual grievance is in fact therefore something more than the personal problem of an employee but is related intimately to the intra-plant and interplant balance of equities 73
5. Seniority provisions which affect the status of an employee in relation to other employees in a unit affect seriously both the employee and the group 76
6. The compartmentalization theory is defective because it seeks to impose an abstraction of dubious validity in any case, to the concrete realities of the work-a-day world of collective bargaining 76

B. The theory that the union's interest in enforcement lapses at the point of contract agreement, with respect to the category of provisions which are alleged to be of primary benefit to the em-

Page

ployees, is defective because (as we have demonstrated earlier):

1. Collective bargaining is a continuous and integrated process which only *begins* with the making of an agreement and necessarily includes administration, application and enforcement of the agreement 78
2. The union as bargaining agency is the major focal point of interest on the employee side of the bargaining relationship throughout the *entire* collective bargaining process with respect to *all* of the provisions of the agreement 78
3. It is therefore absurd to argue that with respect to any particular category of contract provisions the union *can* act as the party at interest in enforcement through the grievance machinery and through arbitration, but that it cannot act as a valid party at interest with respect to necessary subsequent enforcement of these provisions in the courts 78

VI. Although the interest of the bargaining agency in collective bargaining is paramount the individual employee or union member is not without substantial remedy to vindicate his rights 78

A. Union government is characterized by a system of due process through which the individual employee and/or union member can influence outcomes within the limits of representative government 79

B. If he is denied these rights or discriminated against in the exercise of these rights he has specific remedies in the courts and the National Labor Relations Board 80

C. In any case the individual employee can work with like minded associates in removing the existing bargaining agent 83

VII. The *quid pro quo* in collective bargaining is:

A. For the union, the employer's maintenance of the terms of the agreement; For the employer the abridgement of the union's right to strike during the life of the agreement 83

B. But something more as well. For the employer and the union it is a commitment to each other to abide by and enforce for each of their respective sides, the rules of a form of industrial government set in motion by the making of the agreement, for the duration of the agreement 84

Works Cited 84

Biographical notes on authorities cited 88

THE STRUCTURE OF THE COLLECTIVE BARGAINING PROCESS

I

INTRODUCTORY

The purpose of this analysis is to describe the collective bargaining process as a going institution of industrial society, and having accepted standards of common practice. We rely for the facts of the collective bargaining process on the writings of reputable authorities in the field of labor-management relations. The emphasis of this presentation is on:

(a) The role of the union in collective bargaining,

(b) The interconnections between the component phases of the collective bargaining process,

(c) The nature of the three way relationship in collective bargaining between (1) union and employer, (2) union and employee, and between (3) employee and employer.

The institution of collective bargaining is peculiarly susceptible to the type of treatment contemplated here. Although there is by now a substantial body of law on the subject, the legislative mandates which have given force to the public policy with respect to collective bargaining and which have regulated it have necessarily been broad. The administrative agencies and the courts have consequently had to rely on observation of the process at work as the main guidepost in interpreting the legislative mandate. It is the shape and form of this process at work which constitutes the subject matter of this presentation.

II

ACCEPTANCE AND ENCOURAGEMENT OF COLLECTIVE BARGAINING AS PUBLIC POLICY

No extensive documentation is required to demonstrate that the institution of collective bargaining is approved and encouraged as a matter of public policy.

The concluding paragraph of the findings and policies of the Labor Management Relations Act, 1947, reads:

"It is hereby declared to be the policy of the United

States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." [Italics added.]

III

THE PRIMARY RELATIONSHIP ESTABLISHED BY COLLECTIVE BARGAINING IS BETWEEN UNION AND EMPLOYER

At the root of the relationships established by collective bargaining is the relationship between the union and the employer, rather than the relationship between the employee and the employer. Frederick Harbison puts this very pointedly: "First, collective bargaining is strictly *a relationship between organizations*. Contrary to a mistaken belief in many quarters, collective bargaining is not a relationship between management and workers." [1]

As stated by Alexander Hamilton Frey, "The unitary aspect of organized workers is an essential element of collective bargaining." [2]

This basic theme is reiterated in a U. S. Library of Congress report for a Senate committee. "There is no collective bargaining if unions do not do the bargaining for the employees. Thus the acceptance of the union is a fundamental condition of collective bargaining." [3]

This fundamental concept was crucial in the legislative history of the majority rule principle embodied in Section

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[1] "Collective Bargaining and American Capitalism," in Kornhauser, Ross and Dubin, *Industrial Conflict* (1954) *italics in original.*

[2] "Democracy, Free Enterprise and Collective Bargaining," in Matthews, *Labor Relations and the Law* (1953) 45.

[3] Peck, *Factors in Successful Collective Bargaining*, Report of the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, U.S. Senate 82nd Congress, First Sess. (1951) 27.

9(a) of the National Labor Relations Act (Wagner Act) and carried over in the Labor-Management Relations Act, 1947 (Taft-Hartley law).

Section 9(a) of the Wagner Act reads:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employers.

The Taft-Hartley Act retained this language in identical form but added the following:

> ". . . and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect: Provided further, that the bargaining representative has been given the opportunity to be present at such adjustment."

The hearings and debates leading to the enactment of the Wagner Act are replete with criticism of the majority rule principle but when the bills were finally reported out of both the House and Senate committees, the exclusive representation principle was retained. Not only was it retained but it was ardently defended against the criticisms.

> "In view of what has been said, it is apparent that those who oppose majority rule in effect oppose collective bargaining and the making of collection [sic] agreements as the end thereof, by seeking to create conditions making such accomplishments impossible. Those who profess to favor collective bargaining and the general purposes of this bill should favor majority rule, which is the only practical method of achieving the desired ends. Majority rule is at the basis of our democratic institutions. The same organized employer groups who now oppose majority rule for workers have publicly announced their adherence to it as applied to the formulation of codes of fair competition. It has been the experience of the National Labor Relations Board in cases before it that employers opposing majority rule wished only to keep their

responsibilities diffused and to maintain in the picture a complacent minority group, typically a company union, so that no collective agreement might be reached at all. This motivation has been brought to the surface in specific cases where employers refused to recognize the rule when trade unions represented the majority, although in the course of the previous history of the disputes in question, when the opposing employer-promoted company unions had a majority, the employers had invoked the majority rule as the excuse for their refusal to deal with the same trade unions." *(Legislative History of the National Labor Relations Act,* 1935, Volume II, House Report No. 1147 on S. 1958, pp. 3071-2. See also Senate Report No. 573 in S. 1958, at 2312 ibid.)

The legislative intention to retain the principle of exclusive representation by the majority was clearly demonstrated in the adoption of the successor Labor-Management Relations Act, 1947.

Senator Taft stated in the course of the Taft-Hartley debate:

". . . originally, before the passage of any of these laws, the employer undoubtedly had an advantage in dealing with his employees. He was one man; the employees might be thousands; and he could deal with them one at a time. In negotiations of that character he had such a superior advantage that Congress came to feel that it must legislate specifically in order to correct that situation and bring about a balance. . . . Congress passed the Wagner National Labor Relations Act in order that the employees of a single employer might act as one in dealing with one employer, in order that they might be on a sound and an equal basis, a principle which I think no one can question, and which certainly is not questioned in the pending bill.

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"The National Labor Relations Act was enacted for a proper purpose, . . . It was simply for the one purpose of equalizing, or permitting a large group of employees to act as one; in effect to compel them to act as one if the majority desired such action.[4]

[4] 93 Cong. Rec. 3834 (1947). See also pp. 4361, 4446, 4580, 4675, 7536-7537.

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". . . The pending bill retains without limitation, the power of collective bargaining, the power of employees to choose their own representatives, the power to deal with their employer as one man; and if they can get a majority, all the other employees have to keep quiet and permit the representative of the majority to bargain with the employer for all of them. We intend to retain all the benefits of the labor legislation which has been enacted since the twenties.[5]

Similarly, the House Report states:

"Like the present act, this clause of the amended act would make representatives chosen by the majority of the employees in a bargaining unit the exclusive representative of all the employees for the purpose of collective bargaining.[6]

Miss Ruth Weyand's discussion is so highly illuminating on this point that it merits quoting at length:

"Indeed, the terms in which Congress by the Taft-Hartley Act delineated the powers of individual employees with respect to their grievances makes it clear that Congress intended all employees in the unit to be bound by any collective bargaining agreement and did not intend individual employees or groups of employees to negotiate contracts respecting wages, hours or terms of employment after a bargaining representative had been duly selected. The proviso to Section 9(a), as amended, supplements the right to present grievances given by the proviso in the original Act by according to employees the additional right to have such grievances adjusted without the intervention of the bargaining representative as long as the adjustment does not conflict with any collective bargaining contract and so long as the bargaining representative has been given the opportunity to be present at such adjustment. By requiring that any grievance adjustment made by an individual conform to the provisions of any existing collective bargaining contract Congress in effect legislated specifically that all employees in the unit are bound by the collective agreement and cannot enter into any arrangements with their employer for other terms, either with respect to claims accruing for past violations or with respect to terms to be observed for the future.

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[5] 93 Cong. Rec. 4194 (1947). See also p. 4361.

[6] H. Rep. No. 245 on H. R. 2020, 80th Cong., 1st Sess., p. 34. Cf. also pp. 22, 33.

"Similarly, the writing into the grant of exclusive bargaining power to the statutory representative of a limitation thereon, that employees should have the right to present and adjust grievances, shows Congress believed it was granting to the statutory representative the power to exclude all bargaining by individuals. For if individuals were to be free to bargain there would have been no need expressly to accord them the limited right to present and adjust grievances set forth in the proviso. Likewise the terms in which the limitation on the statutory representative's power to preempt the bargaining field are cast negative any grant to individuals of bargaining rights. For the language used, 'present and adjust grievances,' whatever its exact meaning may be, certainly is not phrased in the language Congress would have used had it intended to allow individual bargaining even in instances where the terms of the bargain do not conflict with the collective agreement." [7]

IV

COLLECTIVE BARGAINING IS AN INTEGRATED AND CONTINUING PROCESS

Collective bargaining is a closely integrated process which does not, as is sometimes mistakenly assumed, end with the negotiation of an agreement between the union and the employer. On the contrary, the negotiation of the agreement is only a part of the process and frequently not the most important part.

This essence of collective bargaining as a *continuous* process and the indivisibility of that process is stressed again and again by authoritative students of the field.

Observe Daugherty and Parrish in a widely used labor text book:

"In the broadest sense collective bargaining is a term which may be used to describe this fundamental process of adjustment and accommodation between management and organized labor. Thus conceived, it embraces all the relationship between the two Houses [i.e., union and management] within the area which both have agreed covers their direct face-to-face dealings. It includes not only the periodic negotiation of new labor agreements but also the

[7] "The Scope of Collective Bargaining under The Taft-Hartley Act" in *New York University First Annual Conference on Labor* (1948) p. 269.

day to day relationship between the parties to the agreement as they live under it, interpret it and enforce it on themselves and on each other. In short, it covers the whole range of institutional, organized, direct relationships between the parties." [8]

Or in Davey's formulation:

"As used here, the term 'collective bargaining' is employed to cover the entire range of organized relationship between unions and management, covering the negotiation, administration, interpretation, and application of collective labor agreements.

"This elastic usage is employed to stress the important fact that collective bargaining provides a system for continuous organized relationships between management and unions." [9]

The concept of collective bargaining as a *continuing* process has received judicial approval, as for example:

". . . Collective bargaining is thus seen to be a *continuing and developing process* by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. *It is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result.* Section 7, as we have seen, guarantees to employees the right to organize and engage in concerted activities for the purpose of collective bargaining. This right must necessarily continue so long as the prospect of future bargaining remains. It will thus be seen that the act guarantees to employees the continuous right to maintain labor organizations for the purpose of collective bargaining, after the signing of a particular collective bargaining agreement as well as before." [10]

There are several ways of classifying the successive phases of this continuing collective bargaining process. Davey, characterized these phases as "negotiation, administration, interpretation and application . . ." [11]

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[8] *The Labor Problems of American Society*, 494 (1951).

[9] *Contemporary Collective Bargaining*, 6 (1951).

[10] *National Labor Relations Bd.* v. *Newark Morning L. Co.*, 120 F. 2d 262, 267 (3rd Cir. 1941.) [Italics added.]

[11] *Contemporary Collective Bargaining*, p. 6 (1951).

A. The Negotiation Phase of the Collective Bargaining Process

The content of the negotiation phase of collective bargaining is well established in law and common practice, and consequently needs no detailed elaboration here, except to note the normal content of the collective agreement.

The discussion of a National Labor Relations Board report on the content of the collective agreement (reproduced as Appendix B) divided the agreement into "roughly four sections:" [12]

> "First there is a preamble which sets forth the principles of the agreement, sometimes with a pledge of mutual good will and confidence. This section also describes the processes of collective bargaining and indicates the status of the union, i.e., explicitly grants union recognition. A second section of the agreement enumerates specific conditions of employment. Wages and hours are given in detail together with other provisions. A third section of the agreement provides for its administration and interpretation. Finally, there is provision for duration and renewal."

Shulman, speaking from a record of distinguished experience as a teacher of the law and as an impartial umpire in labor-management disputes, has noted the interdependence of the agreement on the successive links in the collective bargaining process.

> " . . . the resulting collective agreement covers only a small part of their joint concern. It is based on a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to attempt to list in the agreement. It is similarly impractical, if not impossible, to attempt to anticipate and provide against all possible future contingencies. Yet there is usually lacking even a common understanding as to the general effect of the agreement. Doubtless the parties believe that the agreement is binding with respect to its express provisions. But what of the numerous matters of mutual interest with which the provisions do not deal? Is the employer free to take such action as he pleases? Or is he prohibited from taking any action without the prior consent

[12] *Written Trade Agreements in Collective Bargaining* (1939).

of the union—or at least without prior negotiation? Is the union free to make demands with respect to such matters? To use otherwise legal methods of persuasion or coercion to secure them? Or is the collective agreement the exclusive catalog of the employees' rights; and what is the significance of past practices? Rarely does the agreement specifically answer these fundamental questions; and quite frequently the parties actually have different notions about them."

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"Many illustrations can be cited. Negotiators can readily agree that the employer should have the power to discipline for cause. But they would probably negotiate for years without reaching agreement on all matters that should or should not constitute proper cause and what specific penalties should be appropriate in the diverse circumstances.

"Negotiators can generally agree that 'merit and ability' should be a factor, perhaps the paramount factor, in promotions. But they are likely to leave the agreement with quite different notions of what is meant by 'merit' and by 'ability' and how the factors are to be established."[13]

B. Grievance Adjustment Phase of the Collective Bargaining Process

The administration and enforcement phase of collective bargaining is essentially the grievance procedure, the process by which the terms of the contract are applied to individual situations on a case-by-case basis.

1. Structure and Function of Grievance Systems

An authoritative description of the structure and function of grievance machinery has been prepared by the U. S. Bureau of Labor Statistics. This study sets forth:

(1) The purpose of grievance machinery—"to interpret and apply the agreement clauses and give realistic and practical significance to many of its provisions. It is the medium through which employees may protest any alleged or real injustices caused by management in exercising its functions";

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[13] "The Role of Arbitration in the Collective Bargaining Process", in University of California, Institute of Industrial Relations, *Collective Bargaining and Arbitration*, pp. 21, 22 (1949).

(2) The function of the grievance machinery—fact-finding, judicial or interpretive and legislative;
(3) Pattern of grievance procedures—first stage, crystallization and presentation of grievance; second stage, (if not settled at first stage), negotiation between union representative and higher management; final stage, arbitration;
(4) The need for agreement on (a) definition of grievance, (b) representation on grievances, (c) appeals procedure, (d) arbitration.[14]

2. The Grievance System As the Heart of Collective Bargaining

It is well recognized that the grievance procedure is indispensible to the collective bargaining process, and that, indeed, collective bargaining cannot function at all without some system for adjustment of disputes under an agreement.

Hill and Hook from extensive experience on the management side of collective bargaining term the grievance procedure as the "core of the collective bargaining agreement." [15] Russell Smith states that the "grievance procedure is one of the most universal and important provisions in the collective agreement." [16]

A lawyer (Harry Shulman) and an economist (Neil Chamberlain) with extensive backgrounds in labor relations assert:

> ". . . the heart of the collective agreement—indeed, of collective bargaining—is the process for continuous joint consideration and adjustment of plant problems. And it is this feature which indicates the great difference between the collective labor agreement and commercial contracts generally. The latter are concerned primarily with 'end results'; the former, with continuous process." [17]

A decision by the National War Labor Board of World War II stresses the same basic theme:

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[14] U. S. Bureau of Labor Statistics, *Collective Bargaining Provisions, Grievance and Arbitration Provisions*, Bulletin No. 908-16 pp. 1-4 incl. (1950).

[15] *Management at the Bargaining Table*, p. 199 (1945).

[16] *Labor Law—Cases and Material*, p. 1028 (1950).

[17] "Cases on Labor Relations" reproduced in Shister, *Readings in Labor Economics and Industrial Relations*, p. 153 (1951).

"Collective bargaining is not confined to the making of an agreement once a year. It is also a day-to-day process and, on this score, the grievance procedure plays a highly important role." [18]

3. Grievance System As Industrial Government

The grievance machinery has evolved in labor-management relations to the point where it has been visualized (as one writer put it) as "system of *daily* industrial government." [19] And in the words of another authority the grievance procedure "represents the acceptance in labor-management relations of the fundamental notions of due process, and of the virtues of an orderly method of adjusting disputes. The decisions rendered through the established procedure tend to become the industrial case law for the plant." [20] Shulman sees the grievance procedure as "the orderly, effective and democratic way of adjusting disputes within the framework of the collective labor agreement. It is the substitute of civilized collective bargaining for jungle warfare." [21]

4. The Paramount Right of the Bargaining Agency In The Grievance System

What one observer has called "the paramount right of the bargaining agency" is the hallmark of the functioning grievance machinery so far as the employee side is concerned.[22] This means in effect that insofar as the employee grievances are concerned, the union is the institution which is the major party at interest.

The principle as stated by Chamberlain takes this form:

"As itself a party to the contract, it [the union] pos-

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[18] *Chrysler Corporation* [*Detroit, Mich.*] and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO.* 10 War Labor Reports, 551, 554 (1943).

[19] Isadore Katz, "*Minimizing Disputes Through the Adjustment of Grievances*" 12, *Law and Contemporary Problems*, 252 (1947). [Italics in original].

[20] *Labor Law—Cases and Materials*, 1029 (1950).

[21] Quoted in Chamberlain, *The Union Challenge to Management Control (1948)* p. 85-86.

[22] "Minimizing Disputes Through the Adjustment of Grievances" 12 Law and Contemporary Problems 255 (1947).

sesses an interest in maintaining the vitality of the compliance system which is at least as great as the individual employee's interest in seeking redress for personal injury. This position has been effectively advanced by Professor Harry Shulman of the Yale Law School who, from a varied background of arbitration experience, wrote in one grievance decision: 'When the Union processes an employee's grievance, it acts in the dual capacity of representative of the employee and party to the proceeding. It is not merely in the position of counsel for the employee. It is itself a party in interest . . . It is the Union—not the employee—which has the authority to process, and to process, and to determine whether to process, appeals from dispositions in the lower steps of the grievance procedure'." [23]

And as stated by Frieden in a National War Labor Board opinion:

> "It is true that the union settlement of a grievance presented directly by an employee may not be as advantageous to him as he would want or even as he might be able to obtain. But providing only that the union has not acted in bad faith, such a result is an integral part of any system of majority rule and is no justification for subverting the collective bargaining process." [24]

A central reason for the primacy of the union in the grievance machinery is the frequency with which individual grievances involve a subsequent group interest. According to Taylor:

> "It should be emphasized here, however, that the so-called individual grievance frequently involves considerable group interest, particularly when its disposition gives particular meaning, connotation, or substance to a term of the labor agreement. Disposition of many of these grievances is a vital aspect of collective bargaining . . . grievance arbitration frequently involves much more than a simple application of the terms of a labor agreement." [25]

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[23] *The Union Challenge to Management Control*, p. 237 (1948).

[24] NWLB Case No. 111-9715D quoted in Bakke and Kerr, *Unions, Management and the Public*, p. 136 (1948).

[25] "The Voluntary Arbitration of Labor Disputes", University of Michigan Law School, *Lectures on the Law and Labor-Management Relations*, p. 192 (1951).

C. The Arbitration Phase of the Collective Bargaining Process [26]

Arbitration is the capstone of the grievance procedure and as such is therefore of the warp and woof of collective bargaining process. The interconnections have been well stated by Taylor:

> "An important key to the understanding grievance arbitration is to realize that while collective bargaining starts with the negotiation of an agreement, it *necessarily* continue in the settlement of many grievances. They are the difficult grievances. Negotiation or arbitration of grievances should not 'add to' the labor agreement in the sense that new basic terms are incorporated; nor should a clear agreement of the parties be modified. During the life of an agreement, however, grievance settlements will inevitably add important substance and significant meaning to the terms that are in agreement. Grievance settling, by its very nature, fills out the understandings expressed in the contract which are inherently incomplete. Clear and unmistakable answers to many day-by-day problems covered by a particular clause are commonly not found in that clause. If they could be disposed of by direct application of the clause, there would be no real reason to submit them to arbitration." [27]

Shulman makes the same point:

> "For arbitration is an integral part of grievance adjustment during the term of the collective agreement. Its character, its quality, its purpose and function are all determined by the attributes of that process." [28]

The importance of grievance arbitration is attested by the fact that 89 percent of the contracts in effect in 1952 studied by the U.S. Bureau of Labor Statistics contained provisions relating to the arbitration of grievances.[29]

As to the scope and breadth of grievance arbitration,

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[26] See p. 69ff. *infra* for further discussion.

[27] Taylor, "The Voluntary Arbitration of Labor Disputes" in *The Law and Labor Managament Relations*, p. 189-9 (1951). [Italics in original.]

[28] "Collective Bargaining and Arbitration", Institute of Industrial Relations, Univ. of California, p. 25.

[29] *Arbitration Provisions in Collective Agreements*, 1952; 76 Monthly Labor Review, p. 261 (1953).

Chamberlain observes: "Under most grievance arbitration systems *all* the provisions of the agreement, with few exceptions, are subject to final interpretation by an authority other than the legal management." [30]

D. The Problem of Court Enforcement of Collective Agreements

Enforcement generally, of collective bargaining responsibilities, whatever form that enforcement takes is indispensable to the integrity of the collective bargaining process. As Robert Hoxie remarked more than a generation ago: "Neither side can afford to bargain where it cannot depend upon the enforcement of the contract." [31]

The doubtful position of the union in the courts with respect to enforcement of contract violations has called forth criticism from lawyers and economists alike who have studied this problem. These authorities have criticized what might be called the cultural lag of some courts in seeking to fit the labor-management agreement into the inflexible mold of legal categories devised for relationships far removed from the realities of the collective bargaining relationship.

Gregory has observed in this connection:

> "Just what rights can a union secure under a collective agreement and just what obligations does it assume? . . . To begin with, management has everything, and the agreement represents the whittling down of management's rights, due to collective bargaining. Most of these concessions are made on behalf of the employees, to govern the terms of their personal contracts of employment, and are not promises of benefits to the union as such. About the only things that unions get for themselves are recognition, some form of union security like the union or the preferential shop, and the right to initiation fees and union-dues check-offs, with possible controls over apprenticeship and the like. For breaches of these commitments, unions have been permitted to maintain actions against employers, including suits brought to require the return of runaway shops. The employees themselves have to sue for the enforcement of the other terms of these agree-

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[30] Op cit., supra note 23 at p. 108, italics added.

[31] "The Nature of Collective Bargaining" in Shister, *Readings in Labor Economics and Industrial Relations*, p. 150 (1951).

ments, concerning wages, seniority and the like. . . . The resulting cumbersome and costly recourse to the courts is a case of arrested development, which would be serious if employers and unions had not worked out the practical solution of voluntary arbitration." [32]

V

WHAT ARE THE BOUNDARIES OF ENFORCEABLE UNION INTERESTS IN COLLECTIVE BARGAINING?

The theory of enforcement which Gregory criticizes merits further analysis. This theory comes to this set of propositions.

(1) Contractual provisions may be divided between those which benefit the union and those which benefit the employee;

(2) The union may only assert its interest by way of legal enforcement, with respect to the provisions which benefit the union as such. A union may not assert its interest by way of legal enforcement with respect to those provisions which are of benefit to the employees.

As Gregory suggests, provisions relating to union security, checkoff, etc., are assumed under this theory to run to the union's benefit, while wage provisions are assumed to run to the benefit of the individual employee.

The treatment in this analysis does not presume to deal with the legal defensability of this theory. It is worthwhile, however, to examine how the theory stands up against the logic of collective bargaining practice as we have developed it here.

The terms of the agreement cannot be feasibly compartmentalized for the purposes sought by this theory. As Chamberlain has said: "The line between wage and non-wage issues, and between issues that do and do not bear a direct relation to 'wages, hours, and conditions of labor' could probably be drawn no more satisfactorily and precisely by a legislature than it has been drawn in practice at the bargaining table and by labor relations boards." [33] The clear implication of

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[32] *The Collective Bargaining Agreement: Its Nature and Scope*, 6 Labor Law Journal 455 (1950). See also Pierson, *Collective Bargaining Systems*, p. 58 (1942).

[33] *Op cit., supra*, note 23, at p. 153.

the Chamberlain analysis is that no significant lines can be drawn.

Moreover, the administration of the contract frequently involves more than whether a particular employee has received his due. Collective bargaining and especially the administration and enforcement of the contract through a grievance procedure has earlier been characterized as a form of "industrial government", and disputes which arise in the process of government do not therefore occur in isolation.

Accordingly, as Pierson has noted:

> ". . . The disposition of certain controversies may establish important precedents; they may affect an unusually large group of workers; or they may concern questions of a basic nature. Indeed, they sometimes raise the doubt whether collective relations between an employer and union will continue at all; for an agreement may be completely disrupted by struggles over a general reduction in wages or over a change in the method of computing piece-rates or over an effort by the union to circumvent the procedure for handling disputes." [34]

Now, to explore the merits of this compartmentalization with respect to specific provisions of the contract.

1. Check-Off Offers Benefits to Employees

Consider the checkoff as an example of a provision whose benefits, it is argued, run to the union only and not to the employee. To be sure, unions regard it of importance as an assurance of income. But there are obvious advantages to the employees as employees, particularly where there is a union security provision, as Witney has noted:

> "From the point of view of the individual worker, the checkoff provides a simple and convenient method for the payment of union obligations. Assuming that the worker intends to remain in the labor union, he must meet his financial obligations under any circumstances. Where membership in the union is made a condition of employment, the payment of union financial obligations becomes the prerequisite to the holding of a job. If a union-security arrangement prevails, and in the absence of the checkoff, the worker who for some reason fails to make his required union payment might lose his job.

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[34] Pierson, *Collective Bargaining Systems* (1942) p. 10-11.

> "Unless a worker objects to the check-off on psychological grounds, this method of collection appears to serve his interests. Actually the 'psychological' objection to the check-off has very little validity in the current period. Other financial obligations are deducted from his pay check; for example, payments for income tax and social security. Accordingly, the checkoff system for the payment of union obligations equally serves the interests of the worker. The only possible exception to this rule would relate to a circumstance in which the worker does not intend to remain in the organization. Where he must belong to a union to hold a job, the worker would not seriously contemplate going in arrears in his union financial obligations." [35]

McNatt has observed that the check-off "for the union member may provide a more convenient way of meeting his union obligations." [36] McNatt adds:

> "The theory that union members do not approve of check-off requirements negotiated by their union officers and would reject such requirements if they were free to do so, has proven to be as erroneous as the union shop election theory or the theory of voting on the employer's last wage offer." [37]

The check-off as "a convenience to the men", that is, the employees, was given by the National War Labor Board as the reason for directing the inclusion of such a provision in a collective agreement.[38]

In addition the Taft-Hartley law (Sec. 302(c)(4) requires the execution of an individual check-off authorization by each employee if the check-off provision of a contract is to become effective as to him. The employee is under no legal compulsion to sign such an authorization even though there may exist a union security provision and a check-off provision in the contract.

2. Benefits To The Employee In Union Security Provisions

The union security (i.e. union shop, etc.) provisions are

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[35] Witney, *Government and Collective Bargaining*, p. 351 (1951).

[36] *"Check-Off"* 4, Labor Law Journal 123 (1953).

[37] Id. at p. 124.

[38] *The Texas Co.* and *Oil Workers International Union Local 25 (CIO)*, 7 War Labor Reports 415.

also put by some in the category of benefiting the union only. It is possible of course that the term of art—"union security" —may furnish a semantic justification for inferring that such "union security" provisions run only to the benefit of the union and not to the benefit of the employee, but the justification is purely semantic as the facts reveal.

There are some very compelling facts on this point. Before the Taft-Hartley law was amended in 1951 a government directed poll was required among the employees to *authorize* the union to request a union security provision. A union, in order to legally request a union shop provision from an employer was required to secure the approval of a majority of the employees eligible to vote in the bargaining unit.

In the period August, 1947 to October, 1951, the NLRB conducted 46,119 union shop authorization polls. The union shop was authorized in 44,795 of these polls, or 97.1 percent. Put another way, more than 5½ million valid votes were cast, of which something more than 5 million were cast for the union shop, or 91 percent[39] Whitney concluded from these data:

> "Results of the polls indicate that workers in overwhelming numbers believe that all who share in the fruits of collective bargaining should assume its obligations and responsibilities and suggest an indorsement by workers of the point of view that union membership as a condition of employment is the prerequisite for effective, stable and responsible labor organizations. In addition, the outcome of the elections indicates that, in many unions, workers operating through the internal procedure of their unions have much to say about the substance of labor contracts negotiated by their representatives. Union shop polls conducted by a government agency merely confirmed that which already had been decided upon in the union hall."[40]

3. Employees Benefit from Grievance Arbitration

The conception (under the theory that we are analyzing) that arbitration offers no substantial benefit to individual employees covered by a contract is fundamentally erroneous.

First, the kinds of grievances which are arbitrated go over-

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[39] 16 NLRB Annual Report 301.

[40] Witney, *"Union Security,"* 4 Labor Law Journal 107 (1953).

whelmingly to the personal problems of the individual worker within the general framework of the agreement.

The compiler of this presentation has observed in this connection:

> "The handling of workers' grievances on the job is perhaps the single most important function of modern unionism. No union can afford to let down on this vital phase of union functioning. It is easy to see why this should be so: grievances are matters which affect individual workers in a more intimate way than anything else in modern industrial life."[41]

The force of this observation is apparent when we examine the kinds of grievances which are arbitrated, and how, in fact, they *do* affect and are of concern, to *indiviaual* workers in an intimate way. Chamberlain has itemized the coverage of cases decided by arbitration in one important company (unnamed) over a three-year period as illustrative of the scope of arbitration decisions.

> "absences, apprentices, assignment of work, back pay, call-in pay, demotions, discipline, dockage of wages, fair day's work, grievance procedure, hiring-in, holidays, discontinuance of jobs, leaves of absence, lunch periods, merit wage increases, plant protection, premium pay, probationary employees, promotions, rates and classifications, representation of employees, safety rules, designation of seven-day operations, shifts, sick leave, supervisors, temporary employees, transfers, union jurisdiction, vacations, and work week."[42]

The same pattern is indicated in a U. S. Bureau of Labor Statistics analysis of the grievances reaching arbitration in the bargaining relationships between the Bethlehem Steel Co and the United Steelworkrs of America, and reiterate the singularly personal character of the grievances.

> "More than three-fourths (788) of the 1,003 cases were related specifically either to wages or job classifications, or problems concerning seniority. Most of the wage grievances were over hourly or incentive rates established for a specified job or requests for adjustments in hourly or

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[41] Barbash, *Labor Unions in Action*, p. 106 (1948).

[42] Chamberlain, *The Union Challenge to Management Control*, p. 108 (1948).

incentive rates. Almost two-thirds of the seniority grievances reaching arbitration resulted from layoff, downgrading, or 'bumping,' and an additional 20 percent concerned promotion problems.

"Next in prevalence were those grievances concerning discipline or work force assignment. Combined, these categories accounted for almost 15 percent of the total number of grievances reaching arbitration. Disagreements over such issues as job assignment, vacation rights, work schedule, or jobs excluded or included in the bargaining unit, were the causes of most of the remaining grievances."[43]

Updegraff and McCoy with extensive arbitration experience describe some of the most frequently recurring types of disputes which reach arbitration.

"Seniority—One of the most prized rights of the employee today is the right to have his seniority considered in cases of lay-off and promotion. . . .

"The dispute may be as to the proper legal construction of the provision as related to a certain state of facts, or it may be the result of a claim that an employee's seniority right was violated when he was passed over for a promotion, or was laid off out of turn. . . .

"Discipline Cases—Perhaps the greatest single cause of disputes is the imposition of discipline—discharge or layoff. The union may contend that the employee was not guilty, or that he was discriminated against in being disciplined when similar offenses by others went unnoticed, or that his punishment was more severe than justified. . . .

"Working Conditions—Job assignments, work-loads, rest periods, safety precautions, and similar working conditions form the subject of many grievances which frequently go to arbitration. . . .

"Overtime Pay—. . . A tremendous number of disputes have arisen over the proper interpretation of these laws [i.e., Walsh-Healey and Fair Labor Standards] and contract provisions."[44]

This characteristically personal nature of the grievances means that the magnitudes of wage loss claimed as the result

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[43] *Arbitration of Labor-Management Grievances, Bethlehem Steel Company* and *United Steelworkers of America, 1942-52*, Bulletin No. 1159, p. 3 (1954).

[44] *Arbitration of Labor Disputes*, pp. 130, 131, 133-4 (1946).

of an alleged misclassification or layoff out of seniority order or suspension on account of an alleged act of misconduct are typically small. However small, they are of importance to the worker but the chances are that he will not normally go to the expense and time of litigation to enforce his rights. The upshot is that the constructive enforcement of these small claims is available only through the union as bargaining agency, which to be sure is concerned with getting the employee his due, but it is also concerned with maintaining the integrity of the agreement.

Aside from the tangible personal benefits which individual workers receive from the grievance arbitration system, many authorities have stressed the security which the employee achieves if he has the assurance that there is available an ultimate adjudication of his grievances by an impartial authority. Killingsworth has put it this way:

> "Under an arbitration clause, the employee who has been disciplined, refused a promotion, paid the wrong rate, or denied some other right under the agreement can (if his union thinks he has a case) get a hearing before a person that both the company and the union regard as impartial. If the employee and his union can prove his case, he gets redress. In Bethlehem, many employees have won back pay, reinstatement, promotion, and other remedies through arbitration. At the same time the supervisory official against whom complaints of unfair treatment are made is also protected by the process. Without arbitration, employees may develop bitterness against the supervisor and the company even if their charges are without merit. If the supervisor is upheld in arbitration, it is hard for anyone to argue that the complaints were really justified despite this outcome. Grievance arbitration extends to the workplace the idea of affording every man his day in court."[45]

Katz makes the point that the availability of arbitration as the final step in the grievance procedure "gives a sense of security to the parties. It reassures the workers and their repre-

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[45] "The Bethlehem Experience," *Annual Proceedings, Industrial Relations Research Association*, p. 133 (1953).

sentatives that the adjustment of the grievance is not entirely in the hands of the employer."[46]

McCabe asserts:

> "Inasmuch as a dispute is in effect an appeal by the worker for the overriding of a decision made by the employer or his agent, the worker loses if the procedure fails to procure action. Inaction or stalemate leaves the worker where he was before he protested or appealed. To be satisfactory to the workers the procedure must insure that, if a settlement is not reached by agreement, a decision will have to be given. Obviously, too, the procedure must provide that the decision shall be made by an outside body or person. Collective bargaining for terms of employment logically requires this. Unless an interpretation or application of the agreement can be appealed beyond the employer who is an interested party to the dispute, the terms agreed upon may be whittled away by *ex parte* interpretation."[47]

4. The Union Has a Vital Interest in Compliance with Contractual Wage Provisions

The obverse side of the "comparmentalization" theory is that the benefits of the contractual wage provisions run exclusively to the employee. This side of the theory is only partly accurate. To be sure it is the employee who receives wages, not the union. But being only partly correct it misses the point: how *much* pay and pay under what conditions.

It is an elementary fact of collective bargaining that the wage terms of an agreement reflect a "legislative history" of the intent of the parties in agreement on certain wage terms and the surrounding economic facts which lie behind the wage terms. So that the failure to comply with the wage terms of the contract or accommodation to new conditions which arise during the term of the contract involve issues which go far beyond whether or not a worker has received his due. In short the union does have a substantial interest in compliance with the wage terms of the agreement.

Standardization within a plant and between plants is a vital goal of collective bargaining, and is invariably part of the "leg-

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[46] *Op. cit., supra,* note 19, at p. 260.

[47] 5 *Law and Contemporary Problems* 266 (1938).

islative history" of the wage terms of the agreement. George W. Taylor has said:

> "Acceptance of collective bargaining by an employer means in these terms that management is willing to 'go along' and cooperate with the union in developing union security and standardized conditions of employment *within a plant and between competing plants.*"[48]

Or, as Ross has put it: "However we entitle them, comparisons play a large and often dominant role as a standard of equity in the determination of wages under collective bargaining."[49]

Ross continues:

> "Comparisons are important to the employer, whose greatest anxiety, in the absence of imperative economic pressures, is to avoid 'getting out of line.' One of the cardinal sins of business conduct is to offer a wage rate, or a wage increase, which proves embarrassing to other employers. In a period of aggressive union demands, there is a tightening of discipline in the business community; 'getting out of line' is regarded as equally irresponsible with grand larceny.
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> "Comparisons are important to the worker. They establish the dividing line between a square deal and a raw deal. He knows that he cannot earn what he would like to have, but he wants what is coming to him. In a highly competitive society, it is an affront to his dignity and a threat to his prestige when he receives less than another worker with whom he can legitimately be compared. At times he is not sure what makes a legitimate comparison, and needs guidance on the point; this is one source of the moral authority enjoyed by the union leader. . . .
>
> "Comparisons are crucially important within the union world, where there is always the closest scrutiny of wage agreements in the process of negotiation as well as those already negotiated. They measure whether one union has done as well as others. They show whether the negotiating committee has done a sufficiently skillful job of bargaining. They demonstrate to the union member whether he is getting his money's worth for his dues. A favorable

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[48] *Government Regulation of Industrial Relations*, p. 63 (1948). [Italics added.]

[49] *Wage Determinations Under Collective Bargaining*, reprinted in Shister, *op. cit., supra*, note 31 at 249.

comparison ('the best contract in the industry') becomes an argument for the re-election of officers, a basis for the solidification and extension of membership, and an occasion for advancement within the official hierarchy. An unfavorable comparison ('the best we could do under the circumstances') makes it likely that the rank and file will become disgruntled, rival leaders will become popular, and rival unions will become active.

"Finally, comparisons are important to the labor arbitrator. The 'going rate' and the 'prevailing pattern of adjustment' are probably the most compelling criteria of wage determination. Anyone familiar with the realities of arbitration realizes to what extent the other standard criteria are subordinated to this one and employees as supporting rationalizations." [50]

Millis and Montgomery conclude that "in many instances the standardization of wages on the basis of standards already observed by some of the employers is the primary objective of the union. . . . While an effort to equalize and standardize wages and hours in the market may not be made in the first instance, it is likely to appear sooner or later in a unionized trade. Indeed, in many instances the standardization of wages on the basis of the standards already observed by some of the employers is the primary objective." [51]

The union goals in grievance handling, as stated by the author of this presentation, reflect the crucial importance of standardization.

"No grievance can generate more friction among the workers themselves than the existence of disparate rates for the same kind of work, or derangements in the normal job hierarchy. The union looks upon the job of ironing out wage inequities as among the most important in maintaining the support of its membership, since one of the important reasons workers join unions in the first place is to achieve uniformity of treatment. Golden and Ruttenberg put it this way: 'Wage equalization . . . is one of the most explosive jobs either unions or management together or separately can tackle.' Interplant or intercompany wage disparities, particularly as between organized and unorganized companies, put the union in a position

[50] *Id.* at 249-50.

[51] *Organized Labor*, p. 371 (1945).

where it must act to bring up the wages at the lower end of the range. This holds particularly true where labor costs constitute a relatively high proportion of total costs. In terms of the dynamics of union wage policy, the aim is generally to maintain a sensible relationship among various classes of wages as much as it is aimed at achieving some absolute goal of earnings for union members."[52]

5. Seniority Affects Both the Individual Employee and the Group

The seniority provisions of the contract provide an illuminating illustration of why it is hazardous to allocate benefits of a provision to "either-or" categories.

It is well known that employees value their seniority protection highly. It is their only guarantee against arbitrary action in case of a layoff.

It is obvious, however, that the grievance of an employee with respect to a seniority issue cannot be adjusted without affecting the equities of all other employees in a given seniority unit. As the bargaining agency the union is therefore in the unique position of evaluating the seniority claims of an individual employee in relation to the seniority of all other employees in the unit *before* it files a grievance.

Here, then, is a type of grievance that affects the individual *and* the group. There is no practical way of enforcing the seniority provisions other than through the union as the recognized spokesman for the group.

6. Concluding Remarks on "Compartmentalization Theory"

There is a much more fundamental misconception at the bottom of the compartmentalization theory than the specific questions of whether checkoff provisions or union security provisions benefit individual employees, or whether the union has a valid interest in enforcing compliance with the wage provisions of an agreement. This misconception is that there is a large area of conflict of interest or division of interest as between the union and its members. It was such a misconception that was at the bottom of the Smith-Connally Act, passed in 1943. Under that Act unions were required to give notice

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[52] *Labor Unions in Action*, pp. 75-76 (1948).

30 days in advance of striking at a plant operated by a war contractor. During the 30-day period the NLRB was required to take a secret ballot to determine whether or not the employees "will permit any such interruption of war production." While this Act was in effect 2,168 polls were taken by the government. In 1,850 polls, or 95 percent of the total, the vote was in favor of striking. The uselessness of this provision was so apparent that the appropriations act of the NLRB for 1945 prohibited the expenditure of funds for strike vote purposes in spite of the fact that the law itself was still technically operative.[53]

The essential point here is not, of course, the value of polls in labor management relations. Nor is it, that there are not, abstractly, differences between the interests of the union as a union and the interests of employees. Of course there are and in some areas of labor relations it may be sound public policy to give recognition to these areas as, for example, where workers are discriminated against by a union on account of race, color or creed.

But in the area which the theory has undertaken to draw distinctions—that is whether the benefits of specific provisions run to the union or to the employee—it has entered a realm of higher speculation which may be appropriate for purposes of epistemology but which runs contrary to the well-established usages of the collective bargaining process.

Rather, we use the data above to confirm what is known to every realistic practitioner in the field of labor relations; that it is not sensible to draw any distinction between provisions benefiting the union and provisions benefiting the employee on the theory that there may be conflicts or division of interests.

As a report of the tripartite Labor Committee of the Twentieth Century Fund said:

> "Labor's chief move to counter job insecurity has been to build strong, secure unions. The organized worker looks upon the union as his primary safeguard against the risks of both the competitive system and the favoritism of management. Even a sizable proportion of nonunion

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[53] *Hearings before the Committee on Labor and Public Welfare, United States Senate, 83rd Congress, 2nd Session, on Taft-Hartley Act Revisions*, Part 6, p. 3121 (1954).

workers feel the same way. The individual worker's desire for security thus dovetails neatly with one important requirement of the union as an institution—that is, survival. Workers who have lived sufficiently long under the protection of a trade union will often act counter to their individual self-interest to safeguard the security of their union when convinced it is in jeopardy."[54]

B. Criticism of the Theory That the Union's Interest in Enforcement Lapses (with Respect to the Category of Provisions Which Are Alleged to Be of Primary Benefit to Employees) With the Making of the Agreement

The factual basis to refute this phase of the theory has been laid earlier. At this point we will simply piece together the threads of the analysis.

1. Collective bargaining is a continuous and integrated process which only *begins* with the making of an agreement but necessarily includes administration, application and enforcement of the agreement *(supra*, pp. 56-66).

2. The union as bargaining agency is the chief focal point of interest on the employee's side of the bargaining relationship throughout the *entire* collective bargaining process with respect to *all* of the provisions of the agreement. (We have italicized the key words in this formulation.)

3. It is therefore absurd to argue that with respect to a certain category of contract provisions the union *can* act as the party at interest in enforcement through the grievance machinery and through arbitration, but that it *cannot* act as a valid party at interest with respect to necessary subsequent enforcement of these provisions in the courts. If a judicial opinion reaches a conclusion that bars the union as bargaining agency, from asserting its interest beyond the making of an agreement, then it is not consistent with the process of collective bargaining as commonly practiced by the collective bargaining community.

VI

INDIVIDUAL RIGHTS ARE PROTECTED

It cannot be validly inferred from this whole analysis, aimed, to be sure, at demonstrating "the paramount interest of the

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[54] *Partners in Production*, pp. 39-40 (1949).

bargaining agent" that the individual employee or union member is powerless to assert his rights. On the contrary, union government is characterized by a system of due process through which the individual employee can influence outcomes within the limits of representative government. And if he is denied these rights or discriminated against he has available to him specific remedies in the courts and the National Labor Relations Board.

A. Due Process and Democracy in Union Government

Virtually all unions have established channels through which the individual worker can, and does, as a matter of right not dispensation, make his personal interests felt in the policies of the union.

Shister has made extensive studies of the extent of participation in collective bargaining. Pertinent conclusions follow.

> 1. "The evidence discloses that by and large the American trade union member has adequate *opportunity* to participate in the policy making functions of his union."[55]
> 2. "The record discloses that, by and large, the rank and file is given adequate opportunity to elect the people who, directly or indirectly, participate in the negotiations with the employers."[56]

Whitney confirms the essential democratic character of union government:

> "Some people may argue that under a system of collective bargaining, the individual worker has no greater opportunity for self-determination than in a nonunion industrial environment. It is contended that through unions, workers merely transfer the authority for the determination of working conditions from employers to labor union officials. Such a point of view ignores the political structure of labor unions. True, some unions are more democratic than others, and it is expected that the degree of rank-and-file control of union affairs varies directly with the degree of democracy in the labor organization. However, it should be noted that even in the most

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[55] "Who Controls Union Policies" in *Readings in Labor Economics and Industrial Relations*, p. 218 (1951), italics in original.

[56] *Id* at p. 219.

autocratic union, the rank and file still has the power to sweep union leadership out of office. This possibility for change is not present in the employer-employee relationship. Workers cannot remove representatives of management from office. In short, members of unions are aware that conditions of work are being determined by people of their own class, and that these representatives are fundamentally responsible to the rank and file." *Government and Collective Bargaining*. p. 10 (1951).

With respect to the democracy of the grievance procedure we have observed:

"From the perspective of functioning democracy, the handling of grievances between the union committee and supervision is a demonstration of popular participation at its best. The workers' representatives are highly responsive to their constituents; the workers, being close to the problems, are well informed about the issues and the units for which grievances are handled are small enough so that the element of individual personality is not submerged."[57]

B. Protection of Individual Rights Available Under Law

We have developed an ample body of law to protect the legitimate interests of indiivduals in those instances where union procedures fall short of providing equitable treatment.

Section 8(b)(1) of the Labor Management Relations Act, 1947, prescribes that "it shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed under Section 7:. . . ."

Section 7 of the same Act states:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

It is now well settled law that the right of exclusive repre-

[57] Barbash, *Labor Unions in Action*, p. 112 (1948).

sentation by the bargaining agent does not render it immune from the responsibility to exercise reasonable efforts in behalf of *all* of the workers represented, union members as well as non-union members. It is clear too that the National Labor Relations Board and the courts will provide remedies to deter and restrain violations of the rights of minorities which go beyond the bounds of reasonableness.

In *Hughes Tool* (104 NLRB 318 (1953) the Board asserted:

> "The Board has, accordingly, observed that an organization which is granted exclusive bargaining rights under Section 9 has, in return, assumed the basic responsibility to act as a 'genuine representative of *all* the employees in the bargaining unit.'[16] (Emphasis supplied). To hold otherwise, in view of the language of Section 9, would be to allow the exclusive position of the representative obtained through the authority of the Act to be used in a manner detrimental to the very employee the statute is designed to protect.
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> "The duty of equal representation, however, which is inherent in the exclusive representative status accorded by the statute, is not concerned alone with questions of race, color, or creed. The certified representative's ex-exclusive authority to bargain and represent may be achieved by virtue of the support of a bare majority of the employees in the appropriate unit. Discrimination in the performance of the duties of the representative designed to deny equal treatment to those of the minority is to subvert the privilege and rights granted by the statute. Whether such discrimination is based on union membership or the lack thereof, rather than on considerations of race, creed, or color is, in our opinion, irrelevant.
>
> "We believe it is also clear that the presentation and adjustment of grievances is an activity which is subject to this requirement of nondiscriminatory representation by the certified union."

[16] "Larus & Bros. Company, Inc., supra" [62 NLRB 1075 (1945)].

In *Steele* v. *L. and N. R. Co.*, 323 U. S. 192, this Court stated:

> "The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affilia-

tions or want of them. As we have pointed out with respect to the like provision of the National Labor Relations Act in *J. I. Case Co.* v. *Labor Board, supra,* 338, 'The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit . . .' The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it."

And later at p. 204:

"So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action."

This principle of responsibility of the bargaining representative was reaffirmed by this court in *Ford Motor Co.* v. *Huffman* (345 U. S. 330, 1953):

"The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents."

With respect to the grievance procedure, the NLRB asserted the legal obligation of the union to represent *all* employees without discrimination. In *Hughes Tool,* cited above, the Board declared "all employees in an appropriate unit are entitled, upon their request, to the impartial assistance of the

certified representative in the filing and adjustment of grievances." (p. 327.)

C. Employees Can Displace Their Existing Bargaining Agency

Under the Labor-Management Relations Act, employees can change their existing bargaining agency if it fails to reflect their interests adequately. This can be done by voting in a new bargaining agency or "decertifying" the existing bargaining agency. (9(c)(1).)

VII

THE QUID PRO QUO IN COLLECTIVE BARGAINING

What is it that the union, as bargaining agency, and the employer, buy from each other when they enter into a collective bargaining relationship which begins with the making of the agreement?

Of course the employer commits himself to abide by the terms of the agreement relating to wages, hours and working conditions. Of course the union invariably commits itself not to strike during the life of the agreement.

But actually the quid pro quo for each side runs deeper than these obvious considerations. If the concept of collective bargaining as a continuing and continuous process during the life of the agreement has any merit, what the union and the employer *actually* buy is a commitment to observe and enforce, for each of their respective sides, the rules of a form of industrial government set in motion by the making of the agreement, for the duration of the agreement.

Under the rules emerging from this system of industrial government, the employer has a right to expect from the union that (1) it will live up to and observe the rules insofar as the union, *qua* union, is concerned and (a) (equally important) that it will see to it that every employee who is part of the bargaining unit will abide by these rules. So that if an employee objects to the settlement of a grievance made by the union in his behalf with the employer, then the employer under the rules of this industrial government can appropriately insist that a final determination of the issue has been made

with the union and that it is up to the union to secure compliance on the part of the individual employee with the terms of the settlement or adjustment.

Similarly, if an individual employee is dissatisfied with an arbitration award of a grievance, the employer in effect gets a commitment that the award is final, that he is under no obligation to negotiate any further with the individual employee.

This concept of what the parties get from each other in the agreement can be firmly buttressed by the analysis which leading students of the collective bargaining processes have made.

On the concept of collective bargaining as industrial government, Slichter has observed:

> "Collective bargaining, as carried on by labor unions with employers, has two principal aspects. In the first place, it is a method of price-making—making the price of labor. In the second place, it is a method of introducing civil rights into industry, that is, of requiring that management be conducted by rule rather than by arbitrary decision. In this latter aspect, collective bargaining becomes a method of building up a system of 'industrial jurisprudence'."[58]

The Twentieth Century Fund, a private tripartite (labor, management and public) organization describes collective bargaining as applying the "principles of representative democracy to industry and [the working out of] a sort of industrial common law for the conduct of union-management relations."[59]

The role of the union as enforcer of the rules jointly determined by the union and employer has been aptly stated by Summers: The union in bargaining, Summers says, "negotiates a contract which becomes the basic law of [the] industrial community. In making those laws the union acts as the workers' economic legislature. After the laws have been made, the union is charged with their enforcement, and through its grievance procedure helps judge their interpretation and application. It is the workers' policeman and judge. The union is, in short, the employees' economic government."[60]

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[58] Union Policies and Industrial Management (1941) p. 1.

[59] Trends in Collective Bargaining, p. 3 (1945).

[60] "Union Powers and Workers' Rights" in University of Michigan Law School, *The Law and Labor-Management Relations*, p. 375-6 (1951).

Thus even where a collective bargaining agreement merely incorporates past practice which existed prior to the agreement it actually represents an exchange of benefits. The difference for the employer is that under a unilateral system he cannot appropriately expect the kind of "self disciplining labor force" which the Twentieth Century Fund Committee characterized as a "cruicial" management stake in collective bargaining.[61] The employees similarly cannot call on an established agreement and grievance machinery to enforce their claim. They can only rely on the good conscience of the employer. And both public policy and employee sentiment have not found good conscience fully adequate to protect their respective interests.

The recent experience of the Studebaker Corporation and the United Automobile Workers of America, CIO, provides a dramatic illustration of the mutual benefits which are derived from this system of industrial government. When faced with the necessity of cutting wages the collective bargaining relationship provided a mechanism by which the consent of a majority of those to be governed could be obtained. More importantly, the existence of that relationship and the collective bargaining agreement established that, once the majority had agreed, the change would be regarded by all, including the dissenters, as the accepted rule for the industrial community during the period of the agreement.

In short—while the collective agreement establishes wage rates and other benefits these are not in the final analysis the essence of what the parties get from each other. What the parties do gain from collective bargaining are the benefits of a system of industrial government to administer the employer-employee relation.

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* Signifies experience as arbitrator in labor-management disputes as indicated in sources cited above.

APPENDIX B

THE CONTENT OF WRITTEN AGREEMENTS

(From National Labor Relations Board, Division of Economic Research, Bulletin No. 4, *Written Trade Agreements in Collective Bargaining* 39-41 (1939).

The written trade agreement has experienced an evolution similar to that of other business documents. As we have seen, it developed originally from a simple memorandum or bill of prices, and by the end of the nineteenth century the comprehensive trade agreement was in use. Today the agreement is typically a detailed, technical document covering all major conditions of employment.[40] Its content may be divided roughly into four sections.[41] First there is a preamble which sets forth the principles of the agreement, sometimes with a pledge and mutual good will and confidence. This section also describes the processes of collective bargaining and indicates the status of the union, i.e., explicitly grants union recognition. A second section of the agreement enumerates specific conditions of employment. Wages and hours are given in detail together with other provisions. A third section of the agreement provides for its administration and interpretation. Finally, there is provision for duration and renewal.

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[40] A very recent discussion of trade agreement provisions is found in *The Collective Labor Agreement* by Elias Lieberman, 1939.

[41] Professor Hoxie, writing in 1923, used the following classification: "(1) A preamble, defining the parties to the agreement, its scope or field, its duration, and its general purposes. (2) A legislative code, giving the working rules, etc. The points covered by the legislative part of the agreement range from wages and hours to the most minute regulation of all the technical conditions or incidents of work and pay. (3) A judicial code defining the mode of interpretation. (4) An executive part, providing a mode for enforcement. Not all trade agreements have all these distinct and essential parts. They range from the rudimentary ones, including the preamble and legislative code, to those which are most formal and elaborate, containing all parts." Cf. Hoxie, *op. cit.*, pp. 264–65.

The preamble[42] is really a definition of terms and policy. Following the recognition clause are provisions which define the type of workers to be covered by the agreement, distinguish between worker and supervisory force, outline rules for the admittance of union representatives to the shop or company property for conferences with individual workers and management or for other purposes. A very important provision is that governing employment policy as it relates to hiring, layoff, recall, transfer, and promotion.[43] Such policy is usually expressed in terms of a seniority principle, which may be very simply defined in the agreement or elaborately detailed.[44]

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[42] The preamble of a clothing agreement is summarized by Gordon S. Watkins: "In the preamble is set forth what both the union and the employer desire and expect from this written instrument of mutual understanding. The employer desires the establishment and maintenance of discipline and efficiency and anticipates that by the exercise of this discipline all stoppages and interruptions will cease. He expects, moreover, that adherence to the agreement will issue in good standards of workmanship and conduct, that proper quality, quantity, and cost of production will be assured, and that cooperation and good will will obtain between management and men. The union desires that the agreement will operate in such a way as to maintain and strengthen its organization, making possible complete cooperation with the employer and the protection of the workers' interests. It expects, moreover, that there shall be quick recourse to established tribunals in cases of grievances and disputes, such tribunals to be created jointly by the employer and itself." In *Labor Problems,* 1935, pp. 491-92.

[43] Insofar as this provision affects the union's status, it is particularly important during the early stages of collective bargaining when the union is still confronted with the problem of establishing secure organization.

[44] "Seniority, as used in industrial relations, is preference in certain conditions of employment, on the basis of an employee's length of service. The right of seniority is based on the principle that the greatest possible job security, opportunity for promotion, and other privileges should go hand in hand with satisfactory performance on the job." For a detailed discussion of seniority provisions in collective agreements cf. U. S. Bureau of Statistics, *Monthly Labor Review* December 1938, p. 1250.

The wage and hour provisions are of central importance.[45] Minimum rates for specified groups are basic, and sometimes differentials are provided to take account of occupational differences. The manner of payment (by hour, day, or week), the payment period (weekly, semimonthly, or monthly) and the form of payment (cash, check, or otherwise) are specified in the agreement. Miscellaneous wage provisions include bonus plans, traveling expense items, and penalty rates. Provision for hours of work may be simple or complex.[46] There may be nothing more than the total number of hours per day and per week, or there may be detailed provisions, e. g., the beginning and end of the workday, the timing of shifts, the meal period, and rest periods. Limitations upon overtime occur almost universally, together with penalty rates for overtime permitted under the agreement.[47] Holidays and paid vacations are additional features of the agreement.[48]

Agreements are frequently concerned with the comfort and safety of workers, involving washrooms, toilets, lockers, lunchrooms, ventilation, heating, lighting, the guarding of machinery, etc. Apprenticeship programs are governed either by the terms of a comprehensive agreement or a special agreement drafted for the purpose. the provisions cover the period of apprenticeship, the content of

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[45] Professor Yoder writes (*op. cit.*, p. 446): "A very large portion of many trade agreements is given over to the detailed statement of wage scales. Page after page of the printed agreements contain paragraph after paragraph describing various classifications of workers and rates of payment for each class. It is natural, therefore, that the trade agreement is in common labor parlance, a wage agreement."

[46] For illustration of time provisions cf. "Hours of Work Provided in Collective Agreements in 1937," U. S. Bureau of Labor Statistics, *Monthly Labor Review*, February 1938.

[47] *Ibid.*, p. 345.

[48] Cf. "Vacations with Pay under Union Agreements," U. S. Bureau of Labor Statistics, *Monthly Labor Review*, June 1937.

the training program (sometimes in great detail), the number of apprentices that may be employed, and the schedule of wage rates to be applied during the training period. Other provisions of a miscellaneous character are found in the agreement.[49]

The sections of the agreement which relate to its administration and interpretation are especially important because they provide a basis for continuous collective bargaining. It is impossible to provide for all contingencies in drafting an agreement, and even if it were possible, the effects of so rigid a construction might be undesirable.[50] Accordingly the agreement provides for administrative and interpretative machinery. Procedures may be outlined in very general terms in the agreement, or they may be carefully detailed, step by step. Where collective bargaining is very well established, there is often

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[49] A selected list of references taken from issues of the U. S. Bureau of Labor Statistics *Monthly Labor Review* illustrates miscellaneous provisions of the written agreement.

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1931: "Out of Town Work, Compensation for, Provisions for, by Trade," August; "Employers or Contractors Doing Journeymen Work, Agreement, Provisions, by Industry," September; "Union Members, Discharge of, Agreement Provisions," September; "Union Members, Employment of; Agreement Provisions," October.

1934: "Health of Union Members, Analysis of Provisions for Protection of, by Trades," March.

[50] "• • • Obviously, if the wage schedules and other clauses of the collective agreement were inclusive enough to cover all questions that will arise, and so clear as to exclude conflicting interpretations, there would be no inherent need for a machinery for handling disputes. But this is difficult, if not impossible, to attain, even if it were desirable to make a collective agreement of so rigid a pattern." David A. McCabe, "Machinery for the Adjustment of Disputes," in *Law and Contemporary Problems*, Spring 1938, pp. 261-62.

a permanently constituted adjustment body whose jurisdiction and responsibility are defined in the agreement.[51]

The renewal and revision clauses of the agreement are equally important as a basis for continuous bargaining. The provisions of the agreement are usually in effect for a specified period of time, as a rule from 1 to 5 years, and strikes or lockouts are prohibited during that period. Very often, as a result of an automatic renewal clause, agreements are in effect continuously. They may be reopened from time to time for modification or they may be terminated if either party files a required written notice.

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[51] E. g., arbitration machinery in clothing and printing industries, and the special adjustment machinery in the railroad industry.

APPENDIX C

Bulletin No. 908–16 of the
United States Bureau of Labor Statistics

Collective Bargaining Provisions

Grievance and Arbitration Provisions

Introduction

In the day-to-day operations of a plant, involving hundreds and sometimes thousands of workers, problems are bound to arise which affect labor-management relations and the application or interpretation of the terms of the union agreement. They may deal with the procedure of making time studies, the assignment of jobs, disciplinary action, the fairness of transfers and promotions, and other matters involving individual workers or groups and whole departments. Sometimes situations develop which were not foreseen when the agreement was negotiated and for which the agreement has made no provision; occasionally the terms themselves are ambiguous. There are, in fact, few matters contained in labor agreements, and few aspects of the employer-employee relationship which may not, at one time or another, provide the basis for a controversy.

Because of the wide range of potential misunderstandings, practically all collective bargaining agreements set up some sort of grievance adjustment machinery to insure smooth and uninterrupted operations of the plant under the agreement. The grievance machinery exists to interpret and apply the agreement clauses and give realistic and practical significance to many of its provisions. It is the medium through which employees may protest any alleged or real injustices caused by management in exercising its functions.

The grievance machinery has variable functions, depending on the scope and limitations on its use prescribed in the agreement. Its function may be restricted to fact finding in those instances where the dispute centers about the presence or absence of certain facts. Was the discharge for a justified cause? Is an employee qualified to fill a certain position? Was the job done in a workmanlike manner?

It may have a judicial or interpretive function particularly when the dispute arises from the agreement itself and involves the interpretation, application, or enforcement of the agreement terms. Does

the seniority clause provide for plant-wide, or departmental seniority? When overtime is permitted "in an emergency," do rush orders constitute emergencies? The line between fact finding and interpretation is not always clear and, even where clear, both aspects may be involved in a dispute.

Insofar as the grievance procedure results in the creation of rules and regulations to cover a situation not foreseen by the parties at the time the agreement was negotiated, its function is also legislative or law-creating. There is a legislative implication in the joint preparation of rules and regulations which are provided for in some agreements, to implement and make workable certain provisions accepted in principle by both parties, but not sufficiently amplified for application.

Grievance procedures are essentially devices for maintaining peace and orderly operations in the plant. They constitute explicit recognition by labor and management of the need for replacing unrest and dissatisfaction, which may arise during the life of the contract, with an agreed-upon framework for handling and disposing of problems arising in the day-to-day relationships between the management and workers.

As experience in most plants has proven, the most important element in the successful adjustment of plant problems is a wholesome attitude of the parties to the agreement and to each other—good faith and confidence in each other, a cooperative spirit, and mutual respect. Nevertheless, the procedure itself is an important factor in the maintenance of harmonious relations and a safeguard against possible work disruptions. A good procedure promotes the development of good relations even though it does not in itself insure successful adjustment. A poor procedure is a stumbling block in the way of good relations, since it focuses disagreement over the procedure itself rather than over the problem.

The method of using the procedure is that of presenting an issue to successively higher levels of management until it is adjusted, is referred to arbitration, or settled by some other means. It is understood, or explicitly stated, that strikes and lock-outs are to be used only after all other steps provided for the adjustment of the dispute have failed.

Except for a few industries or trades which have developed their own unique practices, there exists a basic pattern underlying the procedure for adjusting disputes in most plants.

The first stage in the adjustment process is the crystallization of a specific grievance and its presentation to a representative of the employer. There are several alternative methods by which the complaint may be presented—by the aggrieved worker himself, by a union

representative working in the plant who has this specific assignment, or by a union representative not employed in the plant, as for example, the union business agent. The first-stage representative of the company in almost every case is the foreman.

The second stage, if the complaint has not been satisfactorily adjusted in the first instance, consists of one or more negotiations on the part of union representatives with successively higher levels of management. In those agreements made between a union and an association of employers, rather than an individual company, the hierarchy of appeals usually includes negotiations with officers of the association.

A succeeding stage is mediation. Some agreements provide that on the failure of the parties to reach a settlement by direct negotiations, an outside agency, such as the Federal Mediation and Conciliation Service, shall be requested to mediate the dispute.

The last stage is arbitration by an impartial arbitrator or arbitrators (or a bipartisan board with an impartial chairman).[1]

Depending upon the character of the industry, as well as the bargaining tradition of the union, appeal of a foreman's decision on a grievance to the higher company officials may be handled by the officers of the local union with or without the active participation of regional or international union officers in the final stages of negotiations. Locals organized on a city-wide basis, or including many small shops or work places in a given area, ordinarily settle their grievances without reference to their international officers, the business agents dealing with the designated officials of the companies.

On the other hand, unions bargaining with large industrial corporations often delegate the higher stages of grievance appeals to their regional or international representatives in order to take advantage of the more skillful bargaining ability of the higher union officials. Also, when a grievance case reaches the highest company officials, the decision may involve an important principle of union-management relations, applicable to more locals than the one originally involved in the dispute.

The employee's immediate supervisor is ordinarily the first representative of management to whom a grievance is presented. In small establishments, the owner himself may handle the initial complaint; in large individual concerns the foreman, the department superintendent, division superintendent, and the plant manager may take their turn in dealing with the union. Personal or labor relations officers, where these are employed, usually take an active part when appeal is taken beyond the foreman, although in some instances the personnel

[1] See p. 81, Arbitration.

officer is involved only after negotiations with the departmental officials have failed to secure a settlement.

In a number of industries, agreements are made with associations of employers which are city-wide, regional, or Nation-wide in scope. Although these associations at times serve solely for the purpose of negotiating new agreements, they may also act as enforcement agencies, in which case the association officials help to settle disputes which arise between the union and any employer who is a member of the association.

Establishment of any grievance procedure entails agreement on the following basic points:

1. *Definition of grievance.*—Some contracts open the machinery to any dispute, while others limit it to interpretations and applications of the agreement.

2. *Representation on grievances.*—This includes the step in the procedure at which the employee may call on the union to represent him, the manner of initiating a grievance, the method of selecting representatives, the functions of such representatives, limitations on the number of union representatives who are permitted to handle grievances, limitations on their activity, special protection and privileges for representatives, and compensation for grievance work.

3. *Appeals procedure.*—This includes the establishment of the procedures to be followed in case the grievance is not disposed of at the first instance; identification of the union and management representatives involved in each step; and the setting of time limits at the various steps, including a limitation of the retroactive date beyond which grievance adjustments shall be inapplicable.

4. *Arbitration.*—Included are definitions of the scope of arbitration, which is sometimes narrower than the area covered by the rest of the grievance machinery; the method of invoking arbitration; the selection of the arbitrator; reference to a permanent arbitrator if the parties agree to have one; the rules of arbitration procedure; and the expenses of arbitration.

APPENDIX D

TABLE OF SUITS BROUGHT UNDER SECTION 301(a)

This appendix lists the reported cases we have been able to find in which suit was brought for breach of contract under the provisions of Section 301(a). It does not include suits in which there was no contract alleged but jurisdiction was mistakenly claimed under Section 301(a). Nor does it include suits begun in state courts and removed to the federal courts under the provisions of Section 301(a).

Suits by Employers Against Unions

Alcoa, S. S. Co. v. *McMahon*, 81 F. Supp. 541 (S.D. N.Y. 1948) aff'd 173 F. 2d 567 (1949) cert. denied 338 U.S. 821.

Bethlehem Steel Co. v. *Industrial Union*, 115 F. Supp. 231 (E.D. N.Y. 1953).

Boeing Airplane Co. v. *Aeronautical Industrial Dist.*, 91 F. Supp. 596 (W.D. Wash. 1950) aff'd 188 F. 2d 356 (C.A. 1951) cert. denied 342 U.S. 821.

Boston & Maine Transp. Co. v. *Amalgamated Assn.*, 106 F. Supp. 334 (D. Mass. 1952).

Castle & Cook Terminals v. *Local 137*, 110 F. Supp. 247 (D. Hawaii 1953).

Colonial Hardwood Flooring Co. v. *International Union*, 76 F. Supp. 493 (D. Md. 1948); aff'd sub nom *International Union* v. *Colonial Hardwood Flooring*, 168 F. 2d 33 (C.A. 4, 1948).

Hamilton Foundry and Machine Co. v. *International Molders and Foundry Workers Union*, 95 F. Supp. 35 (S.D. Ohio 1951) aff'd 193 F. 2d 209 (C.A. 6, 1951) cert. denied 346 U.S. 966.

International Plainfield Motor Co. v. *UAW*, 34 LRR Man. 2718 (D. N.J. 1954).

International Union of Operating Engineers v. *Dahlem Const. Co.*, 193 F. 2d 470 (C.A. 6, 1951).

Isbrandtsen Co., Inc. v. *Local 1291 of International Longshoremen's Association,* 107 F. Supp. 72 (E. D. Pa. 1952), aff'd 204 F. 2nd 495 (C.A. 3, 1951).

Isbrandtsen Co., Inc., v. *National Marine Engineers' Ben. Assn.,* 9 F.R.D. 541 (S.D. N.Y. 1949).

Ketcher v. *Sheet Metal Workers International Assn.,* 115 F. Supp. 802 (E. D. Ark. 1953).

Lewittes & Sons v. *United Furniture Workers,* 95 F. Supp. 851 (S.D. N.Y. 1951).

Ludlow Mfg. & Sales Co. v. *Textile Workers Union,* 108 F. Supp. 45 (D. Del. 1952).

Markel Electric Products, Inc., v. *United Electrical Radio and Machine Workers of America,* 202 F. 2d 435 (C.A. 2, 1952).

Morrison v. *Shopmen's Local Union 682,* 114 F. Supp. 54 (W. D. Ky. 1953).

Paterson Parchment Paper Co. v. *International Brotherhood of Papermakers,* 83 F. Supp. 928 (E. D. Penn. 1949), aff'd 191 F. 2d 252 (C.A. 3, 1951), cert. denied 342 U.S. 933.

Pepper & Potter, Inc. v. *Local 977,* 103 F. Supp. 684 S.D. N.Y. 1952).

Potlatch Forests, Inc. v. *International Woodworkers,* 108 F. Supp. 906 (D. Idaho 1951) aff'd 200 F. 2d 700 (1953).

Shirley Herman Co., Inc. v. *International Hod Carriers Building Union,* 182 F. 2d 806 (C.A. 2, 1950).

Stenzel & Co. v. *Department Store Union,* 28 LRR Man. 2607 (W. D. Missouri 1951).

Tenney Engineering, Inc. v. *United Electrical Radio and Machine Workers of America,* 207 F. 2d 450 (C.A. 3, 1953).

United Electrical Radio and Machine Workers of America v. *Oliver Corp.,* 205 F. 2d 376 (C.A. 8, 1953).

Waiaula Agr. Co. v. *United Sugar Workers,* 114 F. Supp. 243 (D. Hawaii 1953).

Wilson & Co. v. *United Packinghouse Workers*, 83 F. Supp. 162 (S.D. N.Y. 1949).

Suits by Unions Against Employers

A. Breach Alleged Affecting Employees Directly:

American Federation of Labor v. *Western Union Tel. Co.*, 179 F. 2d 535 (C.A. 6, 1950) (pension).

Bakery and Confectionery Workers' International Union v. *National Biscuit Co.*, 78 F. Supp. 517 (E. D. Pa. 1948) aff'd 177 F. 2d 684 (compulory retirement).

Bakery and Confectionery Workers v. *General Baking Co.*, 97 F. Supp. 73 (S.D. N.Y. 1951) (lockout).

Food and Service Trades Council v. *Retail Associates*, 115 F. Supp. 221 (N. D. Ohio 1953) (commissions).

Insurance Agents v. *Prudential Ins. Co.*, 34 LRR Man. 2679 (E.D. Pa. 1954) (arbitration of discharge).

International Union of Operating Engineers v. *Pfeiffer Brewing Co.*, 115 F. Supp. 650 (E.D. Mich. 1953) (discharge; wages).

Lexington Federation of Tel. Wkrs. v. *Kentucky Tel. Corp.*, 94 F. Supp. 894 (E. D. Ky. 1951) aff'd 202 F. 2d 153 (1953) (wages).

Local 207 v. *Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954) (discharge).

Local 379 v. *Jacobs Mfg. Co.*, 120 F. Supp. 228 (D. Conn. 1953) (arbitration of discharge).

Local 793, UAW-CIO v. *Auto Specialties Co.*, 15 F.R.D 201 (W. D. Mich. 1951). (holiday pay).

Local 937 v. *Royal Typewriter Co.*, 88 F. Supp. 669 (D. Conn. 1949) (wages).

Local Union No. 600 v. *Ford Motor Co.*, 113 F. Supp. 834 (E. D. Mich. 1953) (removal of work from plant).

Mercury Oil Refining Co. v. *Oil Workers Int. Union, CIO*, 187 F. 2d 980 (C.A. 10, 1951) reversing in part

Oil Workers International Union v. *Mercury Oil Refining Co.*, 89 F. Supp. 702 (W. D. Okla. 1950) (discharge).

Metal Polishers v. *Rubin*, 85 F. Supp. 363 (E. D. Penna. 1949) (lockout).

Milk and Ice Cream Drivers and Dairy Employees v. *Gillespie Milk Products*, 203 F. 2d 650 (C.A. 6, 1953) (reinstatement).

Silverton v. *Rich*, 119 F. Supp. 434 (S. D. Cal. 1954) (minimum wages; union dues).

Slade v. *Sun Shipbuilding Co.*, 23 LRR Man. 2054 (E. D. Pa. 1948) (reinstatement).

Studio Carpenters Local Union v. *Loew's, Inc.*, 182 F. 2d 168 (9 Cir. 1950) cert. denied 340 U.S. 828 (lockout).

Textile Workers Union v. *Aleo Mfg. Co.*, 94 F. Supp. 626 (N.D. N.C. 1950) (discharge).

Textile Workers Union v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953) (separation pay).

Textile Workers Union of America v. *Arista Mills*, 193 F. 2d 529 (C.A. 4, 1951) (reinstatement).

Textile Workers Union v. *Berryton Mills*, 28 LRR Man. 2541 (N.D. Ga. 1951) (reinstatement).

United Automobile Workers v. *Wilson Athletic G. Mfg. Co.*, 119 F. Supp. 948 (N.D. Ill. 1950) (vacations).

United Protective Workers of America v. *Ford Motor Co.*, 194 F. 2d 997 (C.A. 7, 1952) (compulsory retirement).

United Shoe Workers v. *LeDanne Footwear*, 83 F. Supp. 714 (D. Mass. 1949) (wages).

B. Breach Alleged to Affect Only Union Directly:

Duris v. *Phelps Dodge Copper Products Corp.*, 87 F. Supp. 229 (D. N.J. 1949) (recognition; union dues).

Durkin v. *John Hancock Mutual Life Ins. Co.*, 11 F.R.D. 147 (S.D. N.Y. 1950) injunction denied, 92 F. Supp. 893 (1950) (check-off).

Fur Dressers Union v. *Fur Dressers Guild*, 87 F. Supp. 400 (S.D. N.Y. 1949) (sick benefit fund).

International Union of Electrical, Radio and Machine Workers v. *United Electrical, Radio and Machine Workers*, 192 F. 2d 847 (C.A. 6, 1951).

International Union of Operating Engineers v. *Baker Co.*, 100 F. Supp. 773 (E.D. Pa. 1951) (welfare plan).

International Woodworkers v. *McCloud River Lbr. Co.*, 119 F. Supp. 475 (N.D. Calif. 1953) (insurance fund).

Upholsterer's Inter. Union v. Leathercraft Furn. Co., 82 F. Supp. 570 (E.D. Pa. 1949) (social security fund).

C. Breach involving agreement as a whole:

Mountain States Div. No. 17 v. *Mountain States T. & T. Co.*, 81 F. Supp. 397 (D. Colo. 1948).

United Steelworkers v. *Shakespeare Co.*, 84 F. Supp. 267 (W. D. Mich. S.D. 1949).

United Packinghouse Workers v. Wilson & Co., 80 F. Supp. 563 (N.D. Ill. 1948).
tions; seniority; union dues).

D. Breach not specified:

International Longshoremen's Union v. *Libby, McNeill & Libby*, 114 F. Supp. 249 (D. Hawaii 1953), rehearing denied, 115 F. Supp. 123.

Reed v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949) (see also 25 LRR Man. 2397).

Suits by Union Against Union

Durkin v. *Rieve*, 10 F.R.D. 71 (E.P. Pa. 1949).

Suits by Individuals

Schatte, et al. v. *International Alliance, etc.*, 84 F. Supp. 669 (S.D. Calif. 1949) aff'd 182 F. 2d 158 (C.A. 9, 1950) cert. denied 340 U.S. 828.

MacKay v. *Loew's, Inc.*, 182 F. 2d 170, 18 A.L.R. 2d 348 (9 Cir. 1950) cert. denied 340 U.S. 828.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 57

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX.

	PAGE
Question Presented	1
Statement	2
Argument	5
Conclusion	16

TABLE OF CASES.

American Federation of Labor v. Western Union Telegraph Company, 179 F2 535 (CA 6, 1950) . 12

J. I. Case Co. v. NLRB 321 U.S. 332, 88 L Ed 673 (1944) 9

Mercury Oil Refining Co. v. Oilworkers International Union 178 F2 980 (CA 10, 1951) 14

Milk & Ice Cream Drivers & Dairy Employees Union v. Gillespie Milk Products Corp., 203 F2 650 (CA 6, 1953) 13

Skelly Oil Company v. Phillips Petroleum Company 339 U.S. 667, 94 L Ed 1194 (1950) 8

Textile Workers Union v. Aresta Milk Company 193 F2 529 (CA 4, 1951) 14

The Fair v. Kohler Die & Specialty Company, 228 U.S. 22, 57 L Ed 716 (1913) 9

Trailsmobile Company etc. v. Lawrence Whirls, 331 U.S. 40, 91 L Ed 1328 (1946) 9

United Protective Workers of America v. Ford Motor Company 194 F2 997 (CA 7, 1952) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 725

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Does Section 301(a) and (b) of the Taft-Hartley Act authorize a labor union to sue an employer in a United States District Court to recover wages contracted for by the employer and the employees individually, and allegedly owed to the employees represented by the union?

STATEMENT

On November 19, 1951, the petitioner filed a Complaint in its own behalf in the United States District Court for the Western District of Pennsylvania alleging therein:

1. That the plaintiff union, Association of Westinghouse Salaried Employees, was the collective bargaining representative for certain salaried employees of the defendant, Westinghouse Electric Corporation;

2. That on November 1, 1950, the union and the company entered into a Collective Bargaining Agreement covering the terms and conditions of employment for said employees, a copy of said Agreement being attached to the Complaint;

3. That approximately 4,000 employees whom the union represented did not work on April 3, 1951, and were not paid for that day;

4. That the company's failure to pay for the time not worked constituted a breach of the Collective Bargaining Agreement; and

5. Therefore, the union was entitled to a judgment in *its* favor for the amount of the unpaid salaries.

On December 7, 1951, the respondent filed a Motion to Dismiss the Complaint on the grounds that (a) the Court lacked jurisdiction over the subject matter; (b) the plaintiff was not the real party in interest; and (c) the Complaint failed to state a claim upon which relief could be granted.

On May 26, 1952, the petitioner filed a "First Amended Complaint"; whereupon the respondent filed a

second Motion to Dismiss asserting the same grounds as set forth in its original Motion.

The Amended Complaint changed the form of the action to one brought by the union *"individually"* and *"in behalf of the individuals in interest whom it represents"* rather than one brought in its own behalf.

In addition to asserting that the respondent's refusal to pay the 4,000 employees who did not report for work on April 3, 1951, was a breach of the Collective Bargaining Agreement, the Amended Complaint asserted that respondent's refusal to pay violated certain written instruments which allegedly were a part of the Collective Bargaining Agreement.

The Amended Complaint asked for Declaratory Judgment in favor of the petitioner declaring the rights of the parties under the Collective Bargaining Agreement, and judgment in the amount of the unpaid salaries in favor of the individual employees *who were not named as parties to the action.*

District Judge Rabe F. Marsh held that the Court had jurisdiction over the subject matter and that the petitioner was a proper party plaintiff, but dismissed the Amended Complaint because it failed to state a claim upon which relief could be granted. More specifically, Judge Marsh held that the Collective Bargaining Agreement did not provide that the respondent should pay employees for time not worked; that the numerous instruments attached to the Complaint as Exhibits were not part of the Collective Bargaining Agreement; and that there was nothing in the various instruments which

would require the respondent to pay for the time not worked.

The Court dismissed the Complaint without prejudice to the petitioner to amend by setting forth a cause of action averring that the employees were absent from work because of some reason specifically covered by the contract.

The petitioner, without availing itself of the opportunity to amend in accordance with the Court's Order and without asking for a Final Order to be entered from which an appeal would lie, appealed from the District Court's Order to the Court of Appeals for the Third Circuit. The case was first heard by Circuit Judges Kalodner, Staley and Hastie. It was reargued before the Court *en banc* on December 22, 1953. On January 28, 1954, the Court in a four to three decision entered an Order vacating the judgment of the District Court, and it dismissed the Complaint for lack of jurisdiction. Chief Judge Biggs and Circuit Judges Kalodner and Hastie agreed with the District Judge that, as a matter of law, the petitioner's Complaint should be dismissed because it failed to state a claim upon which relief could be granted. The majority of the Court, speaking through Circuit Judge Staley, indicated their agreement with the District Court that the Complaint failed to state a claim, but thought that the Complaint should be dismissed on the grounds of lack of jurisdiction over the subject matter. (R. 114 and P. 6 of Petition).

The union has petitioned this Court to review the Court of Appeals' decision on the question of jurisdiction. (P. 6 of Petition).

ARGUMENT IN OPPOSITION TO THE PETITION

I.

The Petition Requests an Advisory Opinion.

The petitioner has requested this Court to make an adjudication of the scope of the jurisdiction granted by Section 301 (a) and (b) of the Taft-Hartley Act without having a real "case" or "controversy" to be decided. In effect the petitioner has requested an advisory opinion.

The first Complaint filed by the petitioner in the District Court sought to recover wages for 4,000 employees for time admittedly not worked by the employees. The theory of petitioner's claim was that respondent was required to pay its employees their full month's salary whether they worked or not.

In an effort to meet the respondent's objection that the Complaint failed to state a claim because there was nothing in the Collective Bargaining Agreement which required the respondent to pay employees who refused to work, the petitioner filed an Amended Complaint. In its Amended Complaint the petitioner attempted to incorporate into the Collective Bargaining Agreement the corporation's *Manuals of Accounting & Industrial Relations Policies & Accounting Procedures.* The material which the petitioner sought to incorporate into the Collective Bargaining Agreement consisted of at least six voluminous books containing thousands of very finely printed pages. The petitioner has admitted that there was nothing in the Collective Bargaining Agreement which obligated the respondent corporation to pay those of its employees who voluntarily remained away from work. However, in an effort to bring itself within Sec-

tion 301 (a) and (b) of the Taft-Hartley Act, the petitioner has asserted that there was an obligation to pay for voluntary absences in the corporation's "Operations Manuals" and that those manuals were a part of the contract. Obviously, the petitioner's assertion was without merit.

The parties to the Collective Bargaining Agreement specifically covered all of the types of absences which were to be paid absences; voluntary absences were not included. This fact was admitted by the petitioner. In addition, the parties to the contract specifically provided that the Collective Bargaining Agreement constituted the entire understanding of the parties. (Section XVII of the Contract, R. 44).

The National Labor Relations Board and the eight Federal Judges who have reviewed the case have all agreed that petitioner's claim was without merit.

Prior to the institution of this suit, the petitioner filed an unfair labor practice charge with the National Labor Relations Board, contending before the Board that the respondent's failure to pay the employees for the voluntary absences (the one day's pay for April 3, 1951, for which the union is now suing in this Court) constituted an unfair labor practice. The Regional Director of the National Labor Relations Board found, after a complete and thorough investigation, that the petitioner's claim was completely without merit, and accordingly, refused to issue a complaint against the respondent. The refusal to issue a complaint was appealed by the petitioner to the General Counsel of the National Labor Relations Board in Washington, D. C. This appeal was, after further review and investigation, denied by the General

Counsel, and the decision of the Regional Director in refusing to issue a complaint was affirmed.

These same matters were presented to the District Court in the Complaint filed under Section 301 (a) and (b) of the Taft-Hartley Act. The District Judge dismissed the Complaint as a matter of law because:

1. The Collective Bargaining Agreement did not "contain any covenant on the part of the corporation to pay its employees for voluntary absences." (R. 101);

2. The manuals could not be construed as constituting a covenant that the respondent should pay its employees full salaries for voluntary absences (R. 102 & 103);

3. The manuals "were instructions by the corporation to its accountants for determining the number of hours per week an employee worked and nothing more" (R. 103); and

4. Such manuals were not "adopted and incorporated as a necessary and integral part of said contract" (R. 103).

The District Judge stated in his opinion that:

> "It seems to us that the contract becomes ambiguous solely by reason of the arguments and assertions of the plaintiff on matters dehors the contract. In our opinion the terms of the contract between the corporation and the union are pellucid concerning what type of absence shall be paid absences and what type shall not be paid." (R. 103 & 104).

Before the Court of Appeals, sitting *en banc,* the respondent corporation asserted that the petitioner's claim was not only without merit but also that the Court lacked jurisdiction over the subject matter of the suit. Circuit Judge Hastie, speaking for three members of the Court, agreed with the District Judge that the petitioner's claim was without merit. He stated at Page 129 of the Record: "Coming finally to the merits, I agree with the District Court that the facts alleged do not entitle the plaintiff or the employees it represents to relief." (R. 129).

The majority of the Court, speaking through Circuit Judge Staley, agreed with the District Judge's dismissal of the suit but thought that the dismissal should be put upon the ground of lack of federal jurisdiction over the subject matter. (R. 114). Even the petitioner, at Page 6 of his Petition to this Court asking for review, states that the majority of the Circuit Judges "did indicate their agreement with the trial court as to the inadequacy of the facts stated in the Complaint to support the cause of action."

Although the petitioner's Complaint is obviously defective on its face, the petitioner now requests this Court to review the narrow issue of jurisdiction decided by the Court of Appeals.

It is well settled that jurisdiction in the first instance of a "case arising" under a federal law is determined by the allegations in the plaintiff's Complaint. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U. S. 667, 94 L. ed. 1194 (1950). With deference to the rule that "jurisdiction is the authority to decide the case either way", the respondent respectfully submits that to establish jurisdiction the plaintiff's complaint must be

a *substantial claim* under an Act of Congress, and can not be a claim which is frivolous and obviously without merit. *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 57 L. ed. 716 (1913).

In the case at bar it was necessary for the petitioner to show that the claim arose out of the Collective Bargaining Agreement in order to establish the jurisdiction of the Court. The Labor Board, the District Court and the Court of Appeals were all of the opinion that the petitioner's claim was without merit. In addition, the majority of the Court of Appeals held that the petitioner's claim for wages for the employees, even if sound, arose out of the individual employment contracts rather than the Collective Bargaining Agreement, and therefore, was not within the jurisdiction granted by Section 301 (a) or (b) of the Taft-Hartley Act. See *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332, 88 L. ed. 673 (1944).

The petitioner now seeks to have this Honorable Court review the narrow jurisdictional issue decided by the Court of Appeals, notwithstanding the fact that the petitioner's claim is wholly without merit and even frivolous.

Respondent respectfully submits that the petitioner is in effect seeking an advisory opinion from this Court on the question of the jurisdiction granted by Congress to the United States District Courts under Section 301 (a) and (b) of the Taft-Hartley Act. Such practice has always been condemned by this Court. *Trailsmobile Company & International Union, United Automobile, Aircraft & Agricultural Workers of America, U. A. W., C. I. O., Local No. 392, Petitioners v. Lawrence Whirls*, 331 U. S. 40, 91 L. ed. 1328 (1946).

II.

The Decision of the Court of Appeals in the Case at Bar Is Not Conflict With Decisions of Other Circuits.

The petitioner asserts, as reason for the granting of the Writ, that the decision of the Court of Appeals is in direct conflict with decisions of the Courts of Appeals for the Fourth and Sixth Circuits and is probably in conflict with the views of the Seventh and Tenth Circuits.

A close analysis of the cases relied upon by petitioner will disclose that the decision of the Court of Appeals in the case at bar is not in *direct* conflict with the cited cases and is not in conflict in *principle*.

The petitioner in the case at bar is suing to recover unpaid salaries allegedly owed to 4,000 employees whom the petitioner represents. The 4,000 employees were not parties to the suit; there was nothing in the Collective Bargaining Agreement which provided that the union was authorized to sue for the employees' wages; and there was no allegation in the Complaint that the 4,000 employees had assigned their rights to the wages in question to the petitioner.

The majority of the Court of Appeals followed this Court's decision in *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332, 335, 88 L ed 763 (1944) and distinguished between the Collective Bargaining Agreement and the individual employment contract. The Court stated that:

> "It is perfectly obvious that the collective contract between the union and the employer is not a contract of hire. No one has a job by reason of it

and no obligation to any individual ordinarily comes into existence from it alone." (R. 117 & 118).

The Court pointed out that the right to wages was the individual several right of the employee which arose out of the contract of hire and that:

> "* * * if there was a violation of contract here, it was a violation of the individual employment contract and, thus, there is no federal jurisdiction since Section 301 (a) cannot be invoked." (R. 119).

The Court further pointed out the serious questions which would necessarily be raised by a contrary decision. It stated that:

> "Plaintiff admits that the rights asserted are the individual rights of some four thousand employees. None of them are joined or even named. Indeed, part of the relief sought is the names of those entitled to payment. *In such circumstances, how should the doctrine of res judicata be applied?* If plaintiff should prevail on the merits, *what of an employee in the unit who may have been inadvertently omitted from the reckoning?* Is he barred? *Is defendant safe in paying the judgment in favor of plaintiff? If plaintiff should lose on the merits, as it did in the district court, are all employees in the unit barred?* (R. 122). (Italics supplied)

Petitioner has asserted that the decision of the Court of Appeals in the case at bar is in direct conflict with decisions of the Courts of Appeals for the Sixth Circuit, the Fourth Circuit and probably in conflict with the Seventh and Tenth Circuits.

Argument in Opposition to the Petition.

Respondent respectfully submits that all of the cases cited by the petitioner involve different factual situations as well as principles of law entirely different from those in the case at bar.

Petitioner relies most heavily upon the case of *American Federation of Labor v. Western Union Telegraph Co.*, 179 F. 2d. 535 (C.A., 6, 1950). In that case the union sued for a permanent injunction against the employer from violating a pension agreement which was allegedly part of the Collective Bargaining Agreement. The jurisdictional question presented by the respondent in the case before this Court and decided by the Court of Appeals was never presented to the Court in the *Western Union Case* and it was not decided by that Court, even in principle. In the *Western Union Case* the defendant moved to dismiss for lack of jurisdiction on the ground that the suit was based upon a pension plan and not upon the Collective Bargaining Agreement. This was the sole jurisdictional question presented to and decided by the Court. In addition, the facts in the *Western Union Case* are completely different from the facts in the case before this Court. In that case the Collective Bargaining Agreement specifically referred to the pension plan and provided that during the life of the Collective Bargaining Agreement the company would not abandon or modify its existing pension plan. The pension plan became an essential part of the Collective Bargaining Agreement. The Collective Bargaining Agreement specifically provided that the *"union shall have the right to represent any of its members* before the Pension & Benefit Committee." Under these facts a change in the Pension Agreement which might affect individual employees became a change in the Collective Bargaining Agreement

which by the *contract itself could only* be disputed by the union.

A decision holding that the union could sue under Section 301 (a) and (b) of the Taft-Hartley Act under those facts is far different from a decision holding that a labor union cannot sue to collect the wages belonging to the individual employee under the facts in the case at bar.

The case of *Milk & Ice Cream Drivers & Dairy Employees Union v. Gillespie Milk Products Corp.*, 203 F. 2d 650 (C.A., 6, 1953) which was also cited by the petitioner as being in conflict with the Court's decision in the case at bar, does not touch the issues now before this Court. In that case the union sued the employer for a permanent injunction enjoining the employer from not abiding by an arbitration award allegedly made pursuant to the Collective Bargaining Agreement. The defendant moved to dismiss the complaint on the grounds that Section 301 (a) and (b) did not authorize a Federal District Court to grant injunctive relief and that the Norris-LaGuardia Act prevented the Court from enjoining an employer from violating a labor contract. A reading of the Court's opinion will disclose that the matters decided by the Court of Appeals in the case at bar were never presented to nor decided by the Court in the *Gillespie Case.*

Respondent submits that the *Gillespie Case* does not stand for the proposition urged by the petitioner and is completely irrelevant to the issues presented by the case at bar.

Likewise, the remaining cases cited by the petitioner are not in point on the issues decided by the Court of Appeals in the case before this Court.

The decision of the Court of Appeals for the Fourth Circuit in *Textile Workers Union v. Arista Mills Co.*, 193 F. 2d 529 (1951) is not in conflict with the case at bar. In that case the employees were on strike at the time the union and the employer negotiated a Collective Bargaining Agreement. One paragraph of the Agreement specifically covered the status and seniority rights of the striking workers. The union sued the employer under Section 301 (a) and (b) for violation of this particular clause of the Collective Bargaining Agreement. The jurisdictional question decided by the Court in the case at bar was never presented to nor decided by the Court in the *Arista Mills Case.*

The Tenth Circuit decision relied upon by the petitioner is *Mercury Oil Refining Co. v. Oilworkers International Union,* 187 F. 2d 980 (1951). That case involved a suit under Section 301 (a) and (b) for the enforcement of an arbitrator's award which was made pursuant to the Collective Bargaining Agreement. The question of jurisdiction decided by the Court in the case at bar was neither presented to nor decided by the Court in that case.

The decision of the Court of Appeals for the Seventh Circuit in the case of *United Protective Workers of America v. Ford Motor Co.*, 194 F. 2d 997 (1952) did not pass upon the jurisdictional question raised in the case at bar. The union sued for breach of seniority provisions in the Collective Bargaining Agreement. The individual rights belonging to the employee were not asserted by

the union but instead were asserted in a separate suit by the employee based upon diversity of citizenship and the statutory jurisdictional amount.

Respondent respectfully submits that the case at bar is the only decision by a Court of Appeals where a union has attempted by a suit under Section 301 (a) and (b) of the Taft-Hartley Act to recover the wages individually contracted for by the employer and his employees and allegedly owed to the employees. The Court of Appeals correctly followed the principles of this Court as set forth in *J. I. Case Co. v. N.L.R.B., supra,* and held that the right to wages was an individual several right belonging to the employee by virtue of his employment contract and was not a collective right belonging to the union by reason of the Collective Bargaining Contract. In all of the cases cited by the petitioner where the suit appeared to involve the individual rights of the employees being enforced by the union, the rights were collective rights belonging to the union by reason of specific provisions in the Collective Bargaining Agreement. This principle is well illustrated by the *Western Union Case, supra,* upon which the petitioner relies most heavily. The matters in dispute were pension rights of individual employees which the petitioner in this case urges are not unlike the individual employee's right to wages. However, in that case the individual pension rights were specifically covered by the Collective Bargaining Agreement *and the Collective Bargaining Agreement specifically provided that the union would represent the employees in the enforcement of those rights.*

This is an entirely different situation from the one in the case at bar. Here the union is attempting to re-

cover wages allegedly owed to the individual employees without any authorization from the employees to sue on their behalf.

CONCLUSION

The petition in this case is without merit. The asserted discrepancy of decisions is purely fictitious. There is only a difference of result based upon different facts. The legal principle, decided by the Court, is in harmony with all of the cases relied upon by the petitioner.

The Court of Appeals for the Third Circuit correctly held that Section 301 (a) and (b) of the Taft-Hartley Act did not open the doors of the United States District Courts to hear and decide every individual claim or grievance which an employee might have against his employer.

In enacting Section 301 of the Taft-Hartley Act, Congress did not intend to make a labor union a guardian, or a trustee *ad prosequendum*, for all of the employees of every company for the enforcement of every individual right the employee might have against his employer.

The petitioner seeks review of this jurisdictional issue when its claim upon the merits is obviously defective. A reversal of the decision of the Court of Appeals would not result in a decision in favor of the petitioner.

The issue attempted to be presented to the Court is not clear. The petitioner does not have a case within the jurisdictional grant in Section 301 (a) or (b) of the Taft-Hartley Act. The allegations in the Complaint are

simply being used by the petitioner in an effort to have this Court render an advisory opinion interpreting Section 301 (a) and Section 301 (b) of the Taft-Hartley Act.

Wherefore respondent requests that the Petition for Writ of Certiorari be refused.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 51

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES, Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

BRIEF FOR THE RESPONDENT

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INDEX TO BRIEF.

PAGE

Question Presented 1

Statement 1

Summary of Argument 4

Argument 7

I. The Decision of the Court of Appeals, Dismissing the Complaint for lack of jurisdiction over the subject-matter, should be affirmed 7

II. A labor union is not the proper party plaintiff in an action to recover salaries allegedly owed to employees represented by the union 13

III. Petitioner's Case 27

Conclusion 43

Appendix "A" 44

TABLE OF CITATIONS.

CASES

Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. (2d) 182 (C. A. 4, 1948) 20

American Federation of Labor v. Western Union Tel. Co., 179 F. (2d) 535 (C. A. 6, 1950) 44

Bakery Workers v. General Baking Co., 97 F. Supp. 73 (S. D. N. Y. 1951) 44

Bakery and Confectionery Workers' International Union v. National Biscuit Co., 78 F. Supp. 517 (E. D. Pa. 1948) aff'd 177 F. 2d 684 (C. A. 3, 1949) 44

Clougherty v. James Vernor Co., 187 F. (2d) 288 (C. A. 6, 1951) 15, 22

Table of Citations.

CASES PAGE

Food and Service Trades Council v. Retail Associates, 115 F. Supp. 221 (N. D. Ohio 1953) 44

Fowkes v. Dravo Corporation, 62 F. S. 361 (E. D. Pa., 1945) 15

Insurance Agents v. Prudential Ins. Co., 34 LRR Man. 2678 (E. D. Pa. 1954) 45

International Union of Operating Engineers v. Pfeiffer Brewing Co., 115 F. Supp. 650 (E. D. Mich. 1953) 45

J. I. Case Co. v. N. L. R. B., 321 U. S. 332 (1944) . . 7, 8, 15

Joint Council Dining Car Employees Local 370 v. N. Y. Central R. R. Co., 7 FRD 376 (N. D. Ill. E. D., 1946) 16

Lexington Federation of Tel. Wkrs. v. Kentucky Tel. Corp., 94 F. Supp. 894 (E. D. Ky. 1951) aff'd 202 F. (2d) (1953) 45

Local 207 v. Landers, Frary & Clark, 119 F. Supp. 877 (D. Conn. 1954) 45

Local 379 v. Jacobs Mfg. Co., 120 F. Supp. 228 (D. Conn. 1953) 45

Local 793, UAW-CIO v. Auto Specialties Co., 15 F. R. D. 261 (W. D. Mich. 1951) 45

Local Union No. 600 v. Ford Motor Co., 113 F. Supp. 834 (E. D. Mich. 1953) 46

Local 937 v. Royal Typewriter Co., 88 F. Supp. 669 (D. Conn. 1949) 46

Long, et al. v. Dravo Corporation, 6 FRD 226 (W. D. Pa., 1946) 15

CASES PAGE

Mercury Oil Refining Co. v. Oil Workers Int. Union, CIO, 187 F. 2d 980 (C. A. 10, 1951) 46

Metal Polishers v. Rubin, 85 F. Supp. 363 (E. D. Pa. 1949) 46

Milk and Ice Cream Drivers and Dairy Employees v. Gillespie Milk Products, 203 F. 2d 650 (C .A. 6, 1953) 46

Milk Wagon Drivers Union of Chicago Local 753 v. Associated Milk Dealers, Inc., 42 F. S. 584 (N. D. Ill. E. D. 1941) 15

Newsom et al. v. E. I. Dupont de Nemours & Co., 173 F. (2d) 856 (C. A. 6, 1949) 15

Oil Workers International Union v. Mercury Oil Refining Co., 89 F. Supp. 702 (W. D. Okla. 1950) 46

Pentland v. Dravo Corporation, 152 F. (2d) 851 (C. A. 3, 1945) 14, 15, 22

Rock Drilling, etc., v. Mason & Hangar, Inc., 90 F. S. 539 (S. D. N. Y., 1950) 23

Schatte v. International Alliance of Theatrical Stage Employees, 84 F. S. 669 (S. D. Cal., 1949) 21

Silverton v. Rich, 119 F. Supp. 434 (S. D. Cal. 1954) 46

Slade v. Sun Shipbuilding Co., 23 LRR Man. 2054 (E. D. Pa. 1948) 47

Studio Carpenters Local Union v. Loew's, Inc., 182 F. 2d 168 (9 C. C. 1950) 47

CASES PAGE

Sturgeon, et al. v. Great Lakes Steel Corporation, 143 F. (2d) 819 (C. A. 6, 1944) 15

Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D. N.C. 1950) 47

Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953) 47

Textile Workers Union v. Berryton Mills, 28 LRR Man. 2541 (N. D. Ga. 1951) 47

Textile Workers Union of America v. Arista Mills, 193 F. 2d 529 (C. A. 4, 1951) 47

United Automobile Workers v. Wilson Athletic G. Mfg. Co., 119 F. Supp. 948 (N. D. Ill. 1950) ... 47

United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922) 14

United Packing House Workers of America v. Wilson & Co., 80 F. S. 563 (N. D. Ill., E. D. 1948) 21

United Protective Workers of America v. Ford Motor Co., 194 F. 2d 997 (C. A. 7, 1952) 48

United Shoe Workers v. Le Danne Footwear, 83 F. Supp. 714 (D. Mass. 1949) 48

United States v. L. A. Tucker Truck Line, Inc., 344 U. S. 33 (1952) 43

Williams v. Austrian, 331 U. S. 642 (1947) 32

Wilson & Co., Inc. v. United Packing House Workers of America, 83 F. S. 162 (S. D. N. Y., 1949) 19

Table of Citations.

STATUTES, TEXTS, ETC.

68 A. L. R. 112 13
4 Am. Jur. Section 46, (p. 485) 14
30 Am. Jur. Section 35, (p. 836) 13
Barron & Holtzoff, Vol. 2, Sec. 487, (p. 31) 14
49 C. J. S., Section 28, (p. 68) 13
Fair Labor Standards Act of 1938, 29 U. S. C. A. 216 (b) 22
Federal Rules of Civil Procedure, Rule 17 (a) 27
67 Harv. L. Review 1297 (1954) 34
Labor Management Relations Act of 1947, 29 U. S. C. A., Sec. 185 ..... 16, 20
Moore, 2 Federal Practice 2236 14
Senate Report 105, S. 1126, 80th Congress, (1 CCH Labor Law Reports, Par. 3350.05) 18
21 U. of Chicago L. Rev. 251 35
Article III, Sect. 2, U. S. Constitution 36

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Does Section 301 of the Taft-Hartley Act authorize a labor union to sue an employer in a United States District Court to recover salaries allegedly owed to employees represented by the union?

STATEMENT

On November 19, 1951, the petitioner filed a Complaint in its own behalf in the United States District Court for the Western District of Pennsylvania alleging therein:

1. That the plaintiff union, Association of Westinghouse Salaried Employees, was the collective bargaining representative for certain salaried employees of the defendant, Westinghouse Electric Corporation;

2. That on November 1, 1950, the union and the company entered into a collective bargaining agreement covering the terms and conditions of employment for said employees, a copy of said agreement being attached to the Complaint;

3. That approximately 4,000 employees whom the union represented did not work on April 3, 1951, and were not paid for that day;

4. That the company's failure to pay for the time not worked constituted a breach of the collective bargaining agreement; and

5. Therefore, the union was entitled to a judgment in *its* favor for the amount of the unpaid salaries.

On December 7, 1951, the respondent filed a Motion to Dismiss the Complaint on the grounds that (a) the Court lacked jurisdiction over the subject matter; (b) the plaintiff was not the real party in interest; and (c) the Complaint failed to state a claim upon which relief could be granted.

On May 26, 1952, the petitioner filed a "First Amended Complaint"; whereupon the respondent filed a second Motion to Dismiss asserting the same grounds as set forth in its original motion.

The Amended Complaint changed the form of the action to one brought by the union *"individually"* and *"in behalf of the individuals in interest whom it represents."*

In addition to asserting that the respondent's refusal to pay the 4,000 employees who did not report for work on April 3, 1951, was a breach of the collective bargaining agreement, the Amended Complaint asserted that respondent's refusal to pay violated certain written instruments which allegedly were a part of the collective bargaining agreement.

The Amended Complaint asked for Declaratory Judgment in favor of the petitioner declaring the rights of the parties under the collective bargaining agreement, and judgment in the amount of the unpaid salaries in favor of the individual employees *who were not named as parties to the action.* (R. 7)

District Judge Rabe F. Marsh held that the Court had jurisdiction over the subject matter and that the petitioner was a proper party plaintiff, but dismissed the Amended Complaint because it failed to state a claim upon which relief could be granted. More specifically, Judge Marsh held that the collective bargaining agreement did not provide that the respondent should pay employees for time not worked; that the numerous instruments attached to the Complaint as exhibits were not part of the collective bargaining agreement; and that there was nothing in the various instruments which would require the respondent to pay for the time not worked. (R. 81)

The Court dismissed the Complaint without prejudice to the petitioner to amend by setting forth a cause of action averring that the employees were absent from work because of some reason specifically covered by the contract. (R. 89)

The petitioner appealed from the District Court's Order to the Court of Appeals for the Third Circuit. (R. 89) The case was first heard by Circuit Judges Kalodner, Staley, and Hastie. It was reargued before the Court *en banc* on December 22, 1953. On January 28, 1954, the Court in a four to three decision entered an Order vacating the judgment of the District Court, and dismissed the Complaint for lack of jurisdiction. (R. 96) Chief Judge Biggs and Circuit Judges Kalodner and Hastie agreed with the District Judge that, as a matter of law, the petitioner's Complaint should be dismissed because it failed to state a claim upon which relief could be granted. (R. 107) The majority of the Court, speaking through Circuit Judge Staley, held that the Complaint

should be dismissed on the ground of lack of jurisdiction over the subject matter. (R. 96)

A petition for certiorari was filed by the union on April 26, 1954. The writ was granted on June 7, 1954. (R. 115)

SUMMARY OF ARGUMENT

The decision of the Court of Appeals dismissing the Complaint for lack of jurisdiction over the subject matter should be affirmed. The case is simply an attempt by a union to collect salaries belonging to employees through a law suit allegedly based upon a collective bargaining agreement. Jurisdiction is claimed solely by virtue of Section 301 of the Taft-Hartley Act which gives the District Courts of the United States jurisdiction of cases involving breach of agreements between a union and an employer. The Court of Appeals held that the right to salaries arose out of the individual employee's contract of hire and did not arise out of the collective bargaining agreement between the company and the union. No one had a job by reason of the collective bargaining agreement and there was no obligation on the part of the employer to pay any money by reason of it. The terms of the collective bargaining agreement regarding rates of pay and terms of employment were incorporated into the individual contracts of hire by the National Labor Relations Act but the *right* to the salaries arose from the individual contract of hire which could only be enforced by the individual employee who was a party to that contract.

Summary of Argument.

Section 301 of the Taft-Hartley Act does not contemplate suits for the enforcement of individual rights. Section 301 creates jurisdiction for the enforcement of rights by a union which are strictly *qua* union, or rights which are the joint rights of all of the employees represented by the union. The actions contemplated by Section 301 are those involving provisions of the collective bargaining agreement regarding strikes, lock-outs, union shops, maintenance of membership clauses, runaway shops and arbitration provisions. These provisions all involve rights in which the union has a direct interest. These provisions involve the joint rights of the employees which must be enforced by the union.

The decision of the Court of Appeals followed the law as announced by this Court regarding the respective rights of the parties arising out of the collective bargaining relationship and dismissed the case because the right to salaries arose from the individual employment contract.

An additional reason in support of respondent's position is that assuming, *arguendo,* that the nonpayment of salares involves a breach of the collective bargaining agreement, the union is not the proper party plaintiff to sue for salaries allegedly owed to the employees whom it represents. The right to a salary is an individual right belonging to the employee. By its very nature it cannot be the subject of a class suit. Prior to the enactment of the Taft-Hartley Act a union could only sue for the enforcement of the joint rights of its members. These were the only rights which an unincorporated association had. Section 301 of the Taft-Hartley Act did not change the

structure of an unincorporated association and it did not give the rights belonging to individual employees to the labor union which represented those employees.

In order to sustain petitioner's theory of jurisdiction this Court would have to interpret the Taft-Hartley Act contrary to the intent of Congress. Such an interpretation would require a labor union to prosecute all of the labor grievances of the individual employees whom it represents in the federal courts. Such a construction of Section 301 of the Taft-Hartley Act would have serious, far reaching effects upon the constitutionality of the Act, upon the effectiveness of the National Labor Relations Board, upon the rights of individual employees and upon the administration of justice by our federal courts.

ARGUMENT

I.

The Decision of the Court of Appeals Dismissing the Complaint for Lack of Jurisdiction Over the Subject Matter Should Be Affirmed.

Counsel for the respondent respectfully directs this Court's attention to the following pertinent facts:

(a) At no time during the course of this litigation has the union claimed any damages to itself *qua* union.

(b) The rights here in dispute are admittedly the claims of the individual employees for salaries allegedly owed to the employees. (R. 98)

(c) No individual employee is a party to this suit; the union is the sole party plaintiff.

(d) The union has not averred authorizations or assignments from the individual employees of their claims for salaries.

(e) There is no diversity of citizenship.

(f) Jurisdiction is claimed solely by virtue of Section 301 of the Taft-Hartley Act.

The Court of Appeals followed the reasoning of this Court in the case of *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944). The Court of Appeals held, as this Court did in the *J. I. Case Co.* case, that the rights before the Court were the individual claims of the employees to their salaries, which claims arose out of the individual contracts of hire, and therefore the Court of Appeals held that the claims were not within the purview of Section 301 of the

Taft-Hartley Act. The Court of Appeals held that Section 301 created jurisdiction in the District Courts solely for the enforcement of rights by or against labor unions which were strictly *qua* union.

The *J. I. Case Co.* case involved the problem of the relationship of the collective labor agreement to the individual contract of hire.

The employer in that case refused to bargain with the certified bargaining representative of its employees because of the individual employment contracts which it had entered into with its employees. The Labor Board ordered the employer to *cease and desist* from giving any effect to the individual contracts, and from extending them or from entering into new ones. The Court of Appeals for the Seventh Circuit granted an order of enforcement. This Court granted certiorari in order to settle the problems and to declare the law regarding the two types of agreements. Speaking through the late Mr. Justice Jackson, this Court stated, beginning at page 334:

> "* * * Contract in labor law is a term the implications of which must be determined from the connection in which it appears. *Collective Bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone.* The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing

the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, *which do not of themselves* establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.

"After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. *In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.*

"But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individ-

ual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates." (Italics supplied)

The case at bar is an attempt by a union to collect salaries belonging to individual employees through a law suit allegedly based upon a collective bargaining agreement. It is perfectly clear that this attempt by the union flies squarely in the face of this Court's declaration that the collective bargaining agreement is not an employment contract, and that there is no obligation on the part of the employer to pay any money to the individual employee by reason of it.

The Court of Appeals applied the law as announced by this Court when it held that the *accord* reached by the employer and the union in the collective bargaining agreement regarding rates of pay and hours of work became an essential part of the individual employment contract by reason of the National Labor Relations Act, and when it held that the obligation of the employer to pay the individual employees' salaries arose from the individual employment contracts. It is respectfully submitted that these contracts can only be enforced by the individuals who are parties to the contracts and then, only in forums provided for such actions.

It is admitted that the individual employment contracts cannot waive benefits afforded by the collective bargaining agreement. It is also admitted that the bargaining representative should be satisfied that the indi-

vidual agreements are not inconsistent with the policies established by the collective bargaining agreement. However, the National Labor Relations Act has already provided this safeguard to the collective bargaining process. This is the very problem which was before this Court in the *J. I. Case Co.* case. This Court charged the Labor Board (the Board established by the Congress for this very purpose) with the duty of seeing that the individual contracts of hire did not thwart the collective bargaining process. It is respectfully submitted that the Congress never intended, by enacting Section 301 of the Taft-Hartley Act, that the District Courts should take this "function" from the Labor Board.

The controversy arising out of the individual contracts now before this Court has already been before the National Labor Relations Board. On October 1, 1951, the petitioner filed an unfair labor practice charge with the National Labor Relations Board, contending in effect that the employer's construction of the individual contracts of hire constituted an unfair labor practice. On July 25, 1952, the Regional Director of the National Labor Relations Board found after a complete and thorough investigation, that the petitioner's claim was completely without merit, and accordingly, refused to issue a complaint against the respondent. The refusal to issue a complaint was appealed by the petitioner to the General Counsel of the National Labor Relations Board in Washington, D. C. This appeal was, after further review and investigation, denied by the General Counsel on October 21, 1952, and the decision of the Regional Director in refusing to issue a complaint was affirmed. If the construction of the individual contracts which the employer has adopted had

violated the collective bargaining process, the National Labor Relations Board should have been the tribunal to make that finding.

The Court of Appeals held that the petitioner's case did not come within Section 301 of the Taft-Hartley Act because the obligation of the employer to pay wages did not arise out of the collective bargaining agreement. Section 301 creates jurisdiction for the enforcement of the collective rights of the group. Section 301 creates jurisdiction for the enforcement of the employer's promises in which the union has a direct interest. Such provisions as the lock-out, union shop, maintenance of membership clauses, runaway shop and arbitration provisions apply directly to the union as the collective rights of all of the members. These rights are the joint rights of all of the employees which must be enforced by the union as the representative of the group. These are the rights which can be enforced in a lawsuit under Section 301 of the Taft-Hartley Act.

It is respectfully submitted that the Court of Appeals correctly held that the right to a salary is the individual several right of the employee, which right could not be enforced by the union under the purported authority of Section 301 of the Taft-Hartley Act.

II.

A Labor Union Is Not the Proper Party Plaintiff in an Action to Recover Salaries Allegedly Owed to Employees Represented by the Union.

The amended complaint prays that judgment be entered against the company and in favor of the *individual employees* for the amount of their unpaid salaries.

The individual employees are not parties to this action. This is no averment by the union that the employees have authorized it to institute this action on their behalf, or that the employees have assigned their rights to their salaries to the union. In point of fact part of the relief requested by the union is a complete list of the employees concerned.

It is the company's position that a federal court cannot award judgment for salaries to the individual employees in a suit brought by the union. It is the company's position that this is so, even if it could be established that the company had breached the collective bargaining agreement.

It is a fundamental principle of law that a court will never make a declaration as to, or affecting, rights of persons not parties to the proceeding. See *30 Am. Jur.*, Section 35, (p. 836); 49 C.J.S., Section 28, (p. 68); 68 A.L.R. 112.

This rule is not altered by a representative action in the form of a true class suit or a suit brought by a representative appointed by law. Careful analysis of true representative actions reveals that the court's judgment is effective not upon *absent* parties but upon *unnamed* par-

ties, and it is effective upon *unnamed* parties only because they are present in court by representation.

It is well settled that the *true class* action is the only representative suit of the various class actions where unnamed parties are bound by the judgment. A true class action is one wherein "but for the class action device, the joinder of all interested persons would be essential. This would be in cases where the right to be enforced was joint, common, or derivative." *Moore, 2 Federal Practice 2236; Pentland v. Dravo Corporation,* 152 F. (2d) 851 (C.A., 3, 1945).

There must be a common undivided interest; there must be a common source for the claims.

The true class action device has been particularly applicable to suits by or against unincorporated associations because at common law an unincorporated association had no legal existence. It could not sue or be sued. Suits by or against such associations could only be maintained by joining all of the members, or a representative number in a true class action. *Vol. 2 Barron & Holtzoff,* Sec. 487 (p 31); *4 Am. Jur.* Sec. 46, *et seq.,* (p. 485). In such actions the rights sought to be enforced were necessarily the joint rights of the members for the reason that the association, as such, had no rights.

In the case of *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344 (1922), this Court held that an unincorporated association could sue or be sued in its own name in cases arising under federal law. This decision did not, however, change the legal structure of the association. The association still had no existence

apart from its members, and the rights which could be enforced by it were the joint rights of its members.

In the case at bar the union is admittedly suing for the individual employees' salaries. The individual employees are not named parties to the action. Are they parties by virtue of representation?

The individual employees are not parties to this action by reason of a true class action. Claims for salaries can not be the subject of a true class action. One employee's right to his salary does not depend upon another employee's right to salary. There is no undivided interest in the employees to the salaries. Each employee's right is separate and distinct from the others. Each employee's right to his salary arises from his own contract of hire. *J. I. Case Co. v. N.L.R.B., supra.* The law is well settled that an employee's claim for his salary cannot be a joint claim with those of other employees similarly situated. *Pentland v. Dravo Corporation, supra; Fowkes v. Dravo Corporation,* 62 F. S. 361 (E.D., Pa., 1945); *Long, et al v. Dravo Corporation,* 6 FRD 226 (W. D., Pa., 1946); *Clougherty v. James Vernor Co.,* 187 F. (2d) 288 (C. A., 6, 1951) and see *Newsom, et al v. E. I. Dupont de Nemours & Co.,* 173 F. (2d) 856 (C.A., 6, 1949) and *Sturgeon, et al v. Great Lakes Steel Co. poration,* 143 F. (2d) 819 (C.A., 6, 1944).

These principles of law make it impossible for an unincorporated association to enforce the individual claims of its members. Prior to the Taft-Hartley Act it was specifically held that a labor union could not sue to recover salaries or wages belonging to the individual members of the union. *Milk Wagon Drivers Union of Chi-*

cago Local 753 v. Associated Milk Dealers, Inc., 42 F. S. 584 (N. D., Ill. E. D. 1941); *Joint Council Dining Car Employees Local 370 v. N.Y. Central R.R. Co.*, 7 FRD 376 (N.D., Ill. E. D., 1946). In *Vol. 2 Barron & Holtzoff*, copyrighted in 1950, three years after the enactment of the Taft-Hartley Act, the law is stated on page 7 as follows:

> "Cooperative companies and unincorporated associations have been denied the right to sue for damages to their members under the anti-trust laws without showing the legal right of the association to recover. The same is true of an action to enforce an individual employment contract even if it is based on an agreement with a labor union."

The question thus resolves itself as follows: Did Congress intend, and did the Taft-Hartley Act in fact, change the existing law so as to enable a union to sue the employer for salaries allegedly owed to the employees represented by the union?

Title III of the Labor Management Relations Act of 1947, 29 USCA, Sec. 185, provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activi-

ties affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United tSates, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization."

To enable the union to institute the present suit means that the Act must be interpreted that Congress has made the labor union a trustee *ad prosequendum* for the enforcement of individual employee rights which are several in nature.

It is respectfully submitted that the intent and effect of the Taft-Hartley Act was to enable the employer to

hold the union accountable for its collective agreements in the federal courts. This was not possible prior to the Taft-Hartley Act. The respondent concedes that the union is the proper party to enforce the joint claims of its members because these are the only claims that an unincorporated association can have. But respondent respectfully submits that the union is not the proper party to enforce the individual rights of the employees whom it represents.

It is respondent's position that no authorization for a suit by a union for the individual claims of the employees whom it represents can be found in the Taft-Hartley Act. Nowhere in the legislative history of the Taft-Hartley Act, nor in the Act itself, is there any indication that Congress intended to change the type of interest and rights which the unions could enforce.

The purpose of Section 301 of the Taft-Hartley Act was stated in Senate Report 105, S. 1126, 80th Congress (1 CCH Labor Law Reports, Par. 3350.05) to be:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through

faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal Court. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal Courts in disputes affecting commerce.

"The amendment specifically provides that only the assets of the union can be attached to satisfy a money judgment against it; the property of the individual members of the organization would not be subject to any liability under such a judgment. Thus the members of the union would secure all the advantage of limited liability without incorporation of the union.

"The initial obstacle in enforcing the terms of a collective agreement against a union which has breached its provisions is the difficulty of subjecting the union to process. The great majority of labor unions are unincorporated associations. At common law voluntary associations are not suable as such."

In construing the Taft-Hartley Act the Courts seem to be in complete accord as to the purpose and meaning of Section 301.

In the case of *Wilson & Co., Inc., v. United Packing House Workers of America,* 83 F. S. 162, page 166, (S.D., N.Y., 1949) the court, in construing Section 301, stated:

"Its purpose was to do away with the difficulties which arose in attempting to enforce the provisions of collective bargaining agreements by reason of the fact that in many states labor unions were not suable as entities and in others only under certain circumstances, and that relief against the members in-

dividually was generally impracticable, if not unattainable."

In the case of *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. (2d) 182, pages 187 and 188, (C.A., 4, 1948) the Court stated:

"Contention is made that jurisdiction is vested in the District Court by section 301 (b) of the act, 29 U.S.C.A. § 185 (b), providing that a labor organization may sue or be sued in the courts of the United States 'as an entity and in behalf of the employees whom it represents': *but the purpose and effect of this provision was manifestly to make clear the capacity of labor organizations to come or be brought into court as parties* (Cf. Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 4 Cir., 148 F. 2d 403), *not to enlarge the class of cases of which the District Court were given jurisdiction. The difference between such a provision and one conferring jurisdiction is well illustrated by comparison of 301 (b) of the act with 301 (a), the latter of which confers on the District Courts jurisdiction of suits between employer and labor organizations for violation of contracts.* Another provision conferring jurisdiction on the District Courts is section 303 (b) of the act, which authorizes them to entertain suits for damages on account of the strikes and boycotts made unlawful by section 303 (a). There would, of course, have been no reason for the enactment of either section 301 (a) or section 303 (b), if the effect of section 301 (b) was to vest in the federal courts general jurisdiction of suits by or against labor unions." (Italics supplied)

See also *Schatte v. International Alliance of Theatrical Stage Employees*, 84 F. S. 669 (S.D., Cal., 1949); *United Packing House Workers of America v. Wilson & Co.*, 80 F. S. 563 (N.D., Ill., E.D. 1948).

To say that Section 301 authorizes the union to enforce the rights of its members whether such rights are *joint* or *several* is in effect saying that an employee by joining a union automatically assigns his individual claims to the union. In addition to the objection that the Act does not say this, there is a much stronger objection to petitioner's position. Section 301 (b) does not say that a union can sue in behalf of its members; it says, *a union can sue in behalf of the employees whom it represents.* Under the National Labor Relations Act and under the Taft-Hartley Act, *a union may act for all of the employees of a unit as their collective representative whether the employees are members of the union or not.* Therefore, petitioner's position must mean that an employee, by merely going to work, automatically assigns his claim for salary to the union representing his unit even though he is not a member of the union. To state the proposition makes apparent how untenable it is.

Not only is such a construction of Section 301 untenable; such a construction would most certainly create serious questions as to its constitutionality. The problem raised by the construction urged by the petitioner has in effect been presented to the federal courts in the many cases arising under the Fair Labor Standards Act of 1938.

Petitioner urges that the words in Section 301 (b) "any such labor organization may sue or be sued as an

entity and in behalf of the employees whom it represents," authorizes the union to sue for the individual employees' salaries.

Section 16 (b) of the Fair Labor Standards Act of 1938, 29 U.S.C.A. 216 (b) provides:

> "* * * Action to recover such liability may be maintained * * * by any one or more employees for * * * themselves and other employees similarly situated. * * *"

In the case of *Pentland v. Dravo, supra,* certain named employees instituted an action under this section to recover overtime pay for themselves and for approximately 500 other employees similarly situated who were not named as parties. The Court of Appeals reviewed the law of representative suits as well as the decisions construing this section of the Act and held that an employee's claim for wages was several in nature arising from his individual employment and could not be enforced by other employees similarly situated. The Court construed Section 16 (b) as authorizing a spurious class suit or permissive joinder of the employees similarly situated.

In the case of *Clougherty v. James Vernor Co.,* 187 F. (2d) 288 (C.A., 6, 1951) the same problems arose under Section 16 (b). The Court followed the law as stated in the *Dravo* case and held that Section 16 (b) did not authorize one employee to sue for the wages belonging to another. At page 290 the Court stated:

> "It does not permit a plaintiff to represent another employee without specific authorization, and if it did so it doubtless would be subject to constitu-

tional attack. *The employee thus represented without his consent might be deprived of due process of law.* He could not be bound by any judgment rendered, and yet his case, or some portion of it, might have been tried in the proceedings. Moreover, the defendant has a constitutional right to know who is suing it and the nature of the action against it. To be confronted by a number of claims at the trial, without an opportunity to properly prepare to contest them, would be plainly unfair." (Italics supplied)

Counsel for respondent respectfully submits that the same reasoning should be applied to Section 301 in the case at bar. Congress did not, and possibly could not, assign the individual employees' claim for salaries to the union.

Section 301 was very carefully analyzed and considered by Judge Rifkind, of the District Court for the Southern District of New York, in the case of *Rock Drilling, etc., v. Mason & Hangar, Inc.,* 90 F. S. 539 (S.D., N.Y., 1950).

That case was an action brought by a union in a representative capacity on behalf of its members who were employed by the defendant. The complaint alleged that the company had bribed an officer of the International Union which resulted in the employees working for lower wages and less favorable working conditions than they would have otherwise obtained. It was conceded, and the Court so held, that the claims of the various employees were *several* rather than *joint* and that prior to the Taft-Hartley Act the jurisdictional re-

quirements would have had to have been met by each individual claim. The plaintiff contended, just as the petitioner before this Court is contending, that the Taft-Hartley Act, in effect, appointed the union a *trustee* for the purpose of suing to enforce claims accruing to the employees whom it represents. The Court framed the issue at page 540:

> "* * * The question is thus squarely presented whether Sec. 301 (b) has accomplished such a change as plaintiff alleges. Has it in fact appointed the union a quasi trustee or a trustee *ad prosequendum* to enforce the *several claims* of its members in all or some categories of action?" (Italics supplied)

It should be noted that the issue as framed by the Court completely covers the proposition now before this Court. That is, *does Section 301 (b) appoint the union a Trustee to enforce the several claims of its members in all or some categories of action?*

In answering this proposition in the negative the Court, by Judge Rifkind, stated at page 541:

> "* * * The limitation suggests, by illustration, the host of questions which the Congress has left unanswered *if by the language of Sec. 301 (b) it meant to appoint the union the litigating agent, for those it represents as collective bargaining representative.* What categories of claims may the union assert? Shall it be limited to claims arising out of the employment relationship or may it prosecute all claims? Shall they be claims asserted only on behalf of all the members of the group or may

claims be asserted on behalf of some—less than all —members of the group? What if one of the members of the group before or after action instituted by the union desires to assert his own claim? Is he obliged to commit his claim to the care of the union regardless of his wish to proceed independently? Is he bound by judgment procured in the group action or is he free to disregard it? Is the defendant protected in paying a judgment secured by the group in favor of an individual or is it subject to the jeopardy of additional claims asserted by the individual?

"Neither the statute nor the legislative history affords answers to those questions. I think it improbable that the Congress intended a grant of power which would stimulate such a host of problems for which no answers were provided. I have searched such of the legislative history as has been called to my attention in vain to discover explicit or implicit an intention on the part of the Congress to have the unions appointed trustees *ad prosequendum* or guardians *ad litem* for the individual employees represented by the union as collective bargaining representatives.

"Moreover, plaintiff's interpretation is two-edged. If the sentence 'Any such labor organizations may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States' has the meaning plaintiff attributes to it, I see no reason why straightforward statutory interpretation does not lead to the result that unions may *be sued* in behalf of the employees on claims against individual members. The multitude of com-

plications this interpretation raises need not be articulated.

"The much simpler approach to the statute reads it as a rule defining capacity to sue. The statute authorizes unions in controversies involving union rights to sue in their common names. Thereby, the statute obviates the necessity of meeting the common law requirement that all members of an unincorporated association must join in the suit. In effect, the gist of the statute is to dispense with the class suit device which has been used in order to overcome the common law mandate." (Italics supplied)

The Court held that the words used in Section 301(b), which permitted the labor union to sue as an entity, enabled the union to assert only the *joint* rights of its members; and that the additional words *"and in behalf of the employees whom it represents"* were inserted for the reason that under the Labor Acts, labor unions represented all employees of a unit, whether those employees were members of the union or not. At page 542 Judge Rifkind said:

"The significance of the language 'in behalf of the employees whom it represents' is plain enough under this interpretation. Normally an action in the common name of the union would be, strictly speaking, designed to assert rights on behalf of its members. *However, under the Taft-Hartley Act or the National Labor Relations Act, 29 U.S.C.A. 151 et seq., a union may act for all the employees of a unit as their collective bargaining representative regardless of their membership.* 29 U.S.C.A. § 159.

> This added language in Sec. 301 (b) makes it plain that in a proper case it may sue 'in behalf of the employees whom it represents'." (Italics supplied)

Petitioner's case is not helped by Rule 17(a) of the Federal Rules of Civil Procedure because the right to salaries arises out of the individual employment contract and this contract has to be the basis of the suit. The individual employment contract is not a contract made by a party for the benefit of another.

It is respectfully submitted that even if it is assumed, *arguendo,* that the claims for salaries sought to be recovered here, involve a breach of the collective bargaining agreement, as well as the individual contracts, the union is entitled to no more than an adjudication of the rights of the parties to the contract. It cannot recover salaries owed to the individual employees whom it represents.

III.

Petitioner's Case.

While counsel for the petitioner admits that the legislative history of Section 301 of the Act is not "crystal" clear, he makes crystal clear to this Court the way he wishes it to interpret the Section.

In the summary of his argument (page 6), he states:

> "* * * it is plain that Congress did intend that collective bargaining contracts should be enforceable by both parties at law, and that the federal court should be open to resolve disputes as to the meaning of collective bargaining contracts as a method of avoiding strikes and industrial conflict."

He asks this Court to interpret Section 301 of the Act so that:

> "This basic Congressional purpose can be effectuated only by holding that the substantive problem as to the distribution of rights under a collective bargaining contract must be settled in accordance with federal law, consonant with the other provisions of the National Labor Relations Act, as amended."

On page 9 of his summary he states that:

> "* * * the statutory mandate is without exception or qualification, the mandate must be construed as conferring a right to sue for violation of such provisions. If there were any doubt, it would be removed by Section 301 (b), which specifically authorizes a union to sue as an entity in the federal courts in behalf of all of the employees whom it represents in collective bargaining."

In the case at bar the union is attempting to collect salaries which admittedly belong to the individual employees represented by the union. In his attempt to persuade this Court that the federal courts have jurisdiction under Section 301 of the Act, counsel for the petitioner reasons that a claim for salaries is a grievance, and that in order to insure that the policy of the National Labor Relations Act is effectuated, all grievances must be processed by the union under federal law. Accordingly, he wishes this Court to interpret Section 301 of the Act so as to make the federal district courts the final arbitrators of all grievances.

Such an interpretation by this Court would produce, among others, these results: (a) that federal law would

have to preempt the field; (b) that the common law rights of the individual employees would be completely severed; (c) that the union would become the *parens patriae* for not only the members of the union but for every employee of the particular unit represented by the union; (d) that the common law rights provided to the employers would be abolished; (e) that there would be no forum to hear the individual employee's claims against the union; (f) that the federal district courts would become labor courts, required to pass upon every individual employee's claim and grievance; and (g) that if the present suit states a claim upon which relief can be granted, the District Court of the United States for the Western District of Pennsylvania will have before it 4,000 separate suits which it must try in addition to its present bulging docket.

It is respectfully submitted that the Congress never intended these results in enacting Section 301 of the Act, and that the Congress *did not* enact such results when it passed Section 301. Petitioner has been unable to produce one shred of legislative history, one court decision, or one text book authority to the effect that Section 301 means what petitioner is asking this Court to declare it to mean. It is inconceivable that the Congress intended, in enacting Section 301, to open the doors of the federal courts so wide as to enable a union to bring a suit in a federal district court for every alleged wrong and for every alleged grievance suffered by the individual employee who is represented by the union instituting the suit.

It seems to counsel for the respondent that the intention of Congress in enacting Section 301 is plain.

Congress knew that in some states unions as unincorporated associations could not sue and could not be sued. Congress desired to remove this barrier to their legal responsibility. Congress knew that the federal rules of civil procedure in dealing with a union's capacity to sue had previously made applicable by Rule 17 (b), the rules of the states in which the respective district courts sit. It knew that Rule 17 (b) provided that a union could sue or be sued under a law of the United States, regardless of the state law where the suit arose. It knew that the union could sue for the violation of any law enacted by the Congress of the United States.

Knowing this, what did Congress intend when it passed Section 301 of the Act?

It is respectfully submitted that Congress intended to make companies as well as unions answerable for their collective bargaining agreements in the federal district courts, and that Congress intended that those suits could be instituted "without regard to the citizenship of the parties." Had Congress intended the creation of a federal substantive right which would enable a union to sue on behalf of the individual employees whom it represents for the individual employees' claims in any district court of the United States, instead of creating a right to sue in the federal courts for the rights of the union *qua* union, the clause, "without regard to the citizenship of the parties" would have been unnecessary. Suits arising under the laws of the United States may be brought in federal courts without respect to diversity of citizenship. The use of the clause, "without regard to the citizenship of the parties" is conclusive evidence that Congress had no such intention; that Congress in-

tended only to create a right to enforce collecting rights in the federal courts. It is likewise plain that the language used in Section 301 (b) of the Act was inserted by Congress only to make it clear that in enforcing those collective rights, the union was doing so on behalf of all of the employees whom it represented and not only enforcing the collective rights of its members.

That it was not the intention of the Congress to create such a federal substantive right can be inferred in a negative sense. Since there is nothing said affirmatively on this point in any of the published reports on the bill, it seems crystal clear that Congress had no such intention. Is it possible to conceive that the Congress enacted such a rule into Section 301 of the Taft-Hartley Act without some Representative or without some Senator having questioned the desirability of opening the doors of the federal courts to enable unions to prosecute in those courts all of the individual claims and all of the individual grievances that the employees represented by the union might have against the company? Is it conceivable that such a law would have been enacted without hearings before the Judiciary Committees of both houses of the Congress?

To ask the questions is to answer them.

It is respectfully submitted that had any member of the Congress believed that they were enacting into Section 301 of the Taft-Hartley Act the interpretation of the Act which counsel for the petitioner is seeking to obtain from this Honorable Court, nothing short of a furore would have been created in both houses of the Congress. It is submitted that there would have been hearings upon the question before the Judiciary Committees of both

Houses of the Congress, and it is further submitted that had it been thought that the interpretation here sought was even a remote possibility, Section 301 of the Act would have failed to pass without qualifying language which would have made such an interpretation impossible.

Is it possible that no voice would have been raised in Congress against a construction of Section 301 of the Taft-Hartley Act which would make the federal district courts, labor courts to hear all of the individual employees' claims and grievances?

Is it possible that no member of the Congress would have mentioned the fact that the federal courts have jealously guarded the jurisdictional grants which Congress has made pursuant to Article III of the United States Constitution?

Is it possible that no member of Congress would have brought to the attention of the Congress the dissenting opinion of Mr. Justice Frankfurter in the case of *Williams v. Austrian,* 331 U. S. 642, (1947)? The language used by Mr. Justice Frankfurter in that case is most pertinent to the problem. At page 680 he said:

> "When Congress has not, by plain language, extended the jurisdiction of the district courts which are the feeders of the Circuit Courts of Appeals and of this Court, an unexpressed purpose to swell the dockets of the federal judiciary ought not to be attributed to Congress by considering in isolation the desirability of allowing a particular class of litigation to be brought in a federal court. Any advantage of giving jurisdiction to the federal courts must be

balanced against the disadvantages of taking away from the State courts causes of action rooted in State law. And in considering the advantages of absorption by the federal courts of jurisdiction theretofore vested in the State courts, it should be our special concern to be mindful that the district courts are part of a single judicial system. Increase in the scope of the business of the district courts inevitably reflects itself in the business of the Circuit Courts of Appeals and of this Court. It is a truism, but vital to keep in mind, that increase in the quantity of the court's business affects the quality of its work.

"Where Congress has clearly enlarged the jurisdiction of the district courts, it cannot be withheld no matter what the effect upon the dockets. But where Congress has not manifested its purpose with clarity—more particularly, where such purpose is derived by way of elaborate argumentation—resolution of jurisdictional doubts properly takes into account the strong policy of Congress, expressed through a series of judiciary acts, not to cast burdens upon the federal courts which interfere with the effective discharge of their functions. See, for instance, *American Secur. & T. Co. v. District of Columbia,* 224 U.S. 491, 56 L. ed. 856, 32 S. Ct. 553 and *Phillips v. United States,* 312 U. S. 246, 250, 251, 85 L. ed. 800, 804, 805, 61 S. Ct. 480."

Assuming *arguendo* the desirability of the interpretation of Section 301 of the Act sought by the petitioner in the case at bar, the desirability of the result sought is not the issue presently before this Court for decision. The issue is rather, as stated above, did Congress intend this result and was this result enacted into Section 301 of the Taft-Hartley Act? In his desire to secure such an

interpretation, and in his desire that there be established a body of federal substantive law (even one which would preclude the states from applying local rules of decision in cases affecting inter-state commerce), counsel for the petitioner has the support of some few labor economists, including the support of Mr. Jack Barbash, whose extensive argument on the structure of the collective bargaining process is printed as Appendix "A" of petitioner's brief. It is admitted that Mr. Barbash feels that a uniform Federal labor law would be desirable. It is submitted, however, that his writing on the subject stands on no better footing than the petitioner's brief which seeks the same result.

Counsel for the petitioner, however, has little support in his desire that this result be reached through an interpretation of Section 301 of the Taft-Hartley Act by the Supreme Court of the United States. Professor Archibald Cox, writing on "Federalism in the Law of Labor Relations," 67 *Harv. L. Rev.*, 1297, 1338 (1954), says that while he would prefer the establishment of federal law, leaving to local substantive law only cases involving employers and employees not subject to NLRB jurisdiction, he, nevertheless, doubts

> "* * * the propriety of placing such an interpretation on the present statute. LMRA Section 301 is phrased in terms of jurisdiction and standing to sue. It adds a good deal to the words to read in an instruction to the district courts to develop a body of substantive law. It adds immeasurably more to infer that the federal law should be exclusive, for this conclusion opens the door to removal of actions commenced in a local forum. Nor could one stop there and hope to avoid incongruities. Since Section 301 is

probably inapplicable to suits by individuals, the state courts retain this jurisdiction. It would create hopeless confusion to have one rule applicable to suits by a labor organization and another to suits by individuals. Uniformity could be achieved under a body of federal substantive law only by holding that the rules of decision developed by the federal courts were binding in state tribunals. This would have the rather odd consequence of giving the individual a cause of action under the laws of the United States on which he could sue only in a state court. All this may be wise, but is not the edifice too imposing for the courts to construct on so small a statutory foundation? Since Section 301 is constitutional even though given only the jurisdictional significance by its words, there is no need to imbue it with far-reaching substantive connotations."

In a comment dealing with Section 301 of the Taft-Hartley Act, appearing in 21 U. of Chicago L. Rev. 251, 253, it is said:

> "* * * if it intended as fundamental a change as the development of a federal substantive law, it is not easy to believe that Congress would have attempted to give effect to that intention so laconically."

Upon penalty of being repetitious counsel for the respondent again emphasizes that the desirability of the result sought to be accomplished by counsel for the petitioner, through having this Court interpret Section 301 according to his wishes, is not the issue in this case.

The case is a simple problem dealing with the jurisdiction of the federal courts.

Argument.

Jurisdiction in the federal courts may constitutionally be based upon diversity of citizenship or upon the assertion of a right created by federal law. The Constitution of the United States in Article III, Section 2, provides that:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *" and
>
> "* * * to Controversies * * * between Citizens of different States; * * *"

Since Section 301 (a) of the Taft-Hartley Act does remove the requirement for diversity of citizenship, it is important for this Court to determine what federal substantive rights, if any, are created by the statute because it has been argued that if no federal substantive rights are created, the removal of the requirement for diversity of citizenship does not in and of itself give the federal courts jurisdiction in cases where no law of the United States is involved. If this Court determines that the statute does create a federal substantive right, then, in order to reverse the Court of Appeals, this Court must find that Section 301 (a) creates a federal substantive right which permits a union to institute suit for the individual claims of all of the employees whom it represents. A federal substantive right short of that would require this Court to find that it has no jurisdiction.

It is admitted that the majority of the courts which have considered this question have concluded that Section 301 (a) of the Act does create a federal substantive right. It is not admitted that the majority of the courts which have considered the question have concluded that

the section creates a federal substantive right of action which permits a union to sue upon the individual claims and grievances of the employees whom it represents.

The problem involved in the case at bar has nothing to do with the often discussed question of whether the federal substantive right created by the statute, if one was created, preempts the law relating to violation of collective bargaining agreements. We are not here concerned with the question of whether, if Section 301 (a) created a federal substantive right of action, that right of action is to be decided in accordance with state or federal substantive law. We are concerned only with the question of whether the federal substantive right of action, if any, created by the statute goes so far as to say that a union may institute a suit in a federal court for all of the individual rights, claims, and grievances the employees whom it represents might have, as distinguished from the joint rights of those employees.

It would be entirely possible for this Court to hold that a federal substantive right was created by Section 301 (a), but that the right created is only one which enables a union to institute suit in a federal court for the breach of joint rights obtained by the union at the bargaining table; an action for the joint rights which were granted by the employer to the union in return for the union's promise that the employees whom it represents would not violate a no-strike provision in the contract. This Court could so rule without deciding that the substantive right created by the statute enables the union to institute a suit in a federal court to recover on behalf of the employees whom it represents for individual rights of those employees—to recover "salaries" which the com-

pany has promised the employe in return for the employee's promise to work and to perform services.

Counsel for respondent does not have to argue that Section 301 (a) did not create a federal substantive right; he need only argue that any federal substantive right which might have been created by the Congress cannot encompass the interpretation of that right sought by counsel for the petitioner in this Court.

Notwithstanding the argument made by counsel for the petitioner on page 39 of his brief, the Taft-Hartley Act did not remove the individual employee's remedies—remedies which are embedded in the common law. In point of fact the Taft-Hartley Act is replete with instances where the Congress specifically preserved the rights of the individual. Section 9 (a) of the Act preserves to the employee the right to have his grievances adjusted individually and *without the intervention of the union.* This right to have his grievance adjusted *without the intervention of the union* is not mentioned by counsel for the petitioner in his brief other than to state that an employee has the right to present his grievance individually and have it adjusted; however, he makes much of the fact that the right is conditioned upon the fact that the adjustment must be consistent with the collective bargaining agreement and that the union must be given an opportunity to be present at the hearing.

It would be anomalous, indeed, to hold, as petitioner contends, that the Congress in one section of the Act preserved the right of the individual to adjust his own grievance individually and without the intervention of the union, and then to give, in Section 301, the right to

the union to adjust that grievance, even to the point of instituting a suit for it in a federal court of the United States. Other instances in the Taft-Hartley Act where Congress has emphasized the rights of the individual employee are found in Sections 157, 158 (b) (1), 159 (a), 159 (e), and 186 (c) (4) of Title 29 USCA.

Petitioner's theory makes no provision for the individual employee who may be aggrieved by the union's interpretation of his contract of hire. The employee could not sue the union in the state court because the suit would involve the construction of his individual contract which the petitioner insists must be construed by the federal court. And the individual could not sue in the federal court because Section 301 does not provide for suits between the employee and the union. In considering this situation, Judge Staley, speaking for the majority of the Court of Appeals in the case at bar, 210 F. 2d 623, page 630 aptly said,

> "Everybody admits that it is his (employee) individual right and not that of the union. To say that he has a right to his salary but no remedy to enforce it is a judicial nightmare."

In the case before this Court there are 4,000 separate law suits. Although the union here represents that it is suing as a single plaintiff on behalf of all of the employees, the fact remains that there are 4,000 individuals who have to prove their rights to their salaries, and the fact remains that the employer must make a separate defense to each one of these individual claims. It is impossible to estimate the burden which this will place upon the District Court for the Western District of Pennsylvania.

Argument.

In stating his position, counsel for the respondent is not categorically answering petitioner's brief nor its several appendices. Counsel for respondent is not a labor economist; he is a federal practitioner. Petitioner's brief is an excellent attempt to obtain for labor through an interpretation of the Supreme Court of the United States, what labor itself has been unable to obtain from the Congress. The theories advocated by petitioner in its brief have a certain superficial attractiveness. The brief is clever. It is neat. But it does not set forth sound principles of federal jurisprudence.

Two examples suffice to illustrate counsel for petitioner's misconception of the basic concept of the federal system of jurisprudence. On page 12 of his brief, counsel supposes a suit alleging the non-performance of a contractual obligation. He bases federal jurisdiction upon diversity and then supposes that the obligation sued upon was not the obligation of the defendant but the obligation of a person who was resident of the same state as the plaintiff. He then asks if this would defeat diversity jurisdiction. He answers his question by stating that it obviously would not. He says that the court would have jurisdiction but that the plaintiff would lose his law suit.

A federal practitioner would state that his illustration is inept. The plaintiff loses his suit because he could not establish liability against the citizen of the other state whom he had sued, diversity having been established. The fact that the person who was liable resided in the same state as the plaintiff has nothing to do with the case. The example assumes the very thing which the petitioner has to establish in the case at bar, *i.e.*, juris-

diction. A federal practitioner would never compare diversity jurisdiction with jurisdiction arising under a federal law. They simply are not the same thing. In addition it must be pointed out that a federal court always has jurisdiction to determine jurisdiction.

Again, on page 13, counsel for the petitioner supposes a suit brought by A against B in tort for personal injuries, the jurisdiction of the federal court being based upon diversity. He then supposes that B should prove on the trial of the case that it was not B who committed the tort but some third person and that the third person was a resident of the same state as the plaintiff. He argues that it thus follows that the court does have jurisdiction but that the plaintiff loses his suit upon the merits.

The federal practitioner would analyze the illustration in this manner. A, a resident of one state, has sued B, a resident of another state. If the case involves the requisite amount in controversy, the court does have jurisdiction and the plaintiff loses his suit because the defendant did not commit the tort. The fact that the person who had committed the tort was a resident of the same state as the plaintiff has nothing to do with the case. Petitioner's example could only be pertinent here if upon the trial of the case B established that he and not some third person was a citizen of the same state as A. In the case at bar to establish jurisdiction the petitioner must show that this is a suit within the federal law, and that federal law permits a union to institute suit to recover for the individual rights, claims, and grievances of the employees whom it represents.

Again, the analysis made by counsel for petitioner of the sixty-five different cases in which a suit for breach

of contract under Section 301 (a) was involved, is only superficially accurate. The respondent does not, of course, contend that an *employer* may not sue a *union* for a breach of a collective bargaining agreement, provided that agency is established. Therefore, it is respectfully submitted that the first twenty-five cases in Appendix D of petitioner's brief under the heading of "Suits by Employers Against Unions" are not relevant to the issue involved in the case at bar. Since we are not here concerned with "Suits by Union Against Union" or "Suits by Individuals," the cases listed under those two headings in Appendix D of petitioner's brief are likewise of no aid to this court. Therefore, of the sixty-five cases listed, only thirty-seven—those listed under the heading of "Suits by Unions Against Employers"—are relevant to the case at bar. This list is further reduced to twenty-five by the elimination of those cases listed under subsections B, C, and D. Those cases, as petitioner states, deal with breaches which effect only the union, breaches involving the whole collective bargaining agreement and unspecified breaches.

There are, then, only twenty-five cases listed by petitioner in Appendix D of possible relevance. It is respectfully submitted that in many of these cases the alleged breach affected joint rights, rather than several rights, and that those cases are not authority for the construction of Section 301 which petitioner is urging upon this Court. As Judge Staley pointed out, it has been common for courts to take jurisdiction under Section 301 *sub silentio* or to make an *ipse dixit* declaration that jurisdiction exists. A taking of jurisdiction *sub silentio* is no authority at all. *United States v. L. A. Tucker Truck*

Line, Inc., 344 U. S. 33, 38, (1952). An *ipse dixit* holding of jurisdiction ought not to be given much more weight.

Finally, it is respectfully submitted that petitioner's one or two word parenthetical analysis of each case in Appendix D of his brief is inadequate. Counsel for respondent, therefore, submits his own, more extensive analysis in Appendix A of this brief.

CONCLUSION

Counsel for respondent respectfully submit that the judgment of the Court of Appeals dismissing the Complaint for lack of jurisdiction over the subject matter should be affirmed.

Respectfully submitted,

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APPENDIX "A"

1. *American Federation of Labor v. Western Union Tel. Co.,* 179 F. 2d 535 (C.A. 6, 1950) (Suit by union for alleged breach of company's pension plan. Company's defense was that pension plan was not part of the collective agreement. Court held that the union could maintain the suit. It is to be noted that the collective agreement specifically provided that the union had the right to represent any of its members in matters before the company's pension committee.)

2. *Bakery and Confectionery Workers' International Union v. National Biscuit Co.,* 78 F. Supp. 517 (E. D. Pa. 1948) aff'd 177 F. 2d 684 (C.A. 3, 1949), (Suit involving compulsory retirement. Question of jurisdiction not raised in the District Court. The question of jurisdiction was passed by the Court of Appeals *sub silentio,* mentioned by Judge Staley in his opinion in Footnote 12.)

3. *Bakery Workers v. General Baking Co.,* 97 F. Supp. 73 (S.D.N.Y. 1951) (Suit for damages as a result of a lock-out. A lock-out is one of the enumerated rights, *qua* union, which the Court of Appeals in the case at bar held was within Section 301. Jurisdiction was held by *ipse dixit* statement.)

4. *Food and Service Trades Council v. Retail Associates,* 115 F. Supp. 221 (N. D. Ohio 1953) (Suit by union for alleged breach of collective agreement because employer failed to pay commissions according to contract. The complaint alleged injuries *to the union* as a result of the breach and requested

damages for those injuries in the amount of the commissions due.)

5. *Insurance Agents v. Prudential Ins. Co.,* 34 LRR Man. 2678 (E.D. Pa. 1954) (Suit by union to compel arbitration. Court of Appeals in the case at bar held that arbitration was a right *qua* union which was within Section 301.)

6. *International Union of Operating Engineers v. Pfeiffer Brewing Co.,* 115 F. Supp. 650 (E.D. Mich. 1953) (Suit by union for pay differentials. Jurisdiction was passed *sub silentio*)

7. *Lexington Federation of Tel. Wkrs. v. Kentucky Tel. Corp.,* 94 F. Supp. 894 (E. D. Ky. 1951) aff'd 202 F. 2d (1953) (This is the wrong citation. Case does not concern the Taft-Hartley Act. Correct citation is 11 F.R.D. 526 which is a suit by union for wages under amendment to the Fair Labor Standards Act. Jurisdiction was passed *sub silentio*).

8. *Local 207 v. Landers, Frary & Clark,* 119 F. Supp. 877 (D. Conn. 1954) (Suit by union to compel arbitration. The Court of Appeals in the case at bar held that arbitration was a right *qua* union within Section 301.)

9. *Local 379 v. Jacobs Mfg. Co.,* 120 F. Supp. 228 (D. Conn. 1953) (Arbitration. Court of Appeals in the case at bar held that arbitration was a right *qua* union which was within Section 301. Jurisdiction held by *ipse dixit* statement).

10. *Local 793, UAW-CIO v. Auto Specialties Co.,* 15 F.R.D. 261 (W.D. Mich. 1951) (Suit by union to

collect holiday pay, mentioned by Judge Staley in his opinion in Footnote 12.)

11. *Local 937 v. Royal Typewriter Co.,* 88 F. Supp. 669 (D. Conn. 1949) (Suit by union for *damages* for breach of wage provisions in contract. Jurisdiction held by *ipse dixit* statement, mentioned by Judge Staley in his opinion in Footnote 12.)

12. *Local Union No. 600 v. Ford Motor Co.,* 113 F. Supp. 834 (E. D. Mich. 1953) (Suit by union to prevent decentralization of employer's plant. This involves a right *qua* union within the decision of the Court below.)

13. *Mercury Oil Refining Co. v. Oil Workers Int. Union, CIO,* 187 F. 2d 980, C.A. 10, 1951) reversing in part *Oil Workers International Union v. Mercury Oil Refining Co.,* 89 F. Supp. 702 (W. D. Okla. 1950) (Arbitration. Court of Appeals in the case at bar held that arbitration was a right *qua* union which was within Section 301. Jurisdiction held by *ipse dixit* statement, mentioned by Judge Staley in his opinion in Footnote 12.)

14. *Metal Polishers v. Rubin,* 85 F. Supp. 363 (E. D. Pa. 1949) (Suit by union for *damages* because of lock-out. Lock-out involves a right *qua* union within Section 301 and decision of Court below.)

15. *Milk and Ice Cream Drivers and Dairy Employees v. Gillespie Milk Products,* 203 F. 2d 650 (C.A. 6, 1953) (Arbitration. A right *qua* union within Section 301 and decision of Court below)

16. *Silverton v. Rich,* 119 F. Supp. 434 (S. D. Cal. 1954) (Suit by union for breach of union shop provision.

This is a right *qua* union within Section 301 and decision of Court below.)

17. *Slade v. Sun Shipbuilding Co.*, 23 LRR Man. 2054 (E. D. Pa. 1948) (Suit by an individual. Union was not a party.)

18. *Studio Carpenters Local Union v. Loew's, Inc.*, 182 F. 2d 168 (9 C.A. 1950) (Suit by union for damages because of lock-out. This is a joint right within Section 301 and decision of Court below.)

19. *Textile Workers Union v. Berryton Mills*, 28 LRR Man. 2541 (N.D. Ga. 1951) (Suit by union for damages for employer's refusal to reinstate striking employees. Jurisdiction was held by *ipse dixit* statement.)

20. *Textile Workers Union v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D. N.C. 1950) (Arbitration. Court of Appeals in the base at bar held that arbitration was a right *qua* union which was within Section 301.)

21. *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953) (Arbitration. Court of Appeals in the case at bar held that arbitration was a right *qua* union which was within Section 301.)

22. *Textile Workers Union of American v. Arista Mills*, 193 F. 2d 529 (C.A. 4, 1951) (Suit by union for declaration of rights of striking employees under collective bargaining agreement.)

23. *United Automobile Workers v. Wilson Athletic G. Mfg. Co.*, 119 F. Supp. 948 (N.D. Ill. 1950) (Suit by union for breach of agreement regarding paid vaca-

tions. Jurisdiction was held by an *ipse dixit* statement, mentioned by Judge Staley in his opinion in Footnote 12.)

24. *United Protective Workers of America v. Ford Motor Co.,* 194 F. 2d 997 (C. A. 7, 1952) (Suit by union and an individual employee because of compulsory retirement of employee. The union asked only for a declaration of the parties' rights under the contract. The individual employee sought back pay and reinstatement; but jurisdiction of his action was not by Section 301 but by diversity of citizenship.)

25. *United Shoe Workers v. LeDanne Footwear,* 83 F. Supp. 714 (D. Mass. 1949) (Suit by union involving wage increase. Court held jurisdiction by an *ipse dixit* statement.)

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No. 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES
Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR REHEARING

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INDEX

Page

Petition for Rehearing 1

1. The Constitutional Issue Has Not Been Briefed or Argued 3
2. The Opinion of Mr. Justice Frankfurter 4
3. The Opinions of the Chief Justice and Mr. Justice Reed .. 8
4. The Pennsylvania Law Was Not Before the Court 11
5. The Presence of a Full Court on Reargument 13

Conclusion and Certificate 13

CITATIONS

Cases:

Arbechesky Unemployment Compensation Case, 174 Pa. Super. 217, 100 A. 2nd 396 (1953) 12

Babbitt v. *Wilmer & Vincent, Inc.*, 14 Lehigh County, L. J. 97 (1930) 12

Chernko v. *Moore*, 64 D. & C. 638 (1948) 12

Commonwealth v. *Great American Indemnity Co.*, 312 Pa. 183, 167 Atl. 793 (1933) 12

Joint Board, Waist & Dressmakers Union v. *Rosinski*, 173 Pa. Super. 303, 98 A. 2nd 447 (1953) 12

Roberts v. *Penn Tobacco Co.*, 34 Luzerne Leg. Reg. 237 (1939) 12

United Mine Workers v. *Monheim*, 11 Fayette Legal Journal 17 (1947) 12

Yost v. *Finch*, 32 Berks C. L. J. 68 (1939) 12

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WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR REHEARING

Association of Westinghouse Salaried Employees, petitioner herein, respectfully petitions this Court for a rehearing in this case. As stated in the opinion of Mr. Justice Frankfurter, certiorari was originally granted here "for consideration of a section of the Taft-Hartley Act which has proved a fertile source of difficulty for the lower federal courts." We respectfully suggest that the opinions filed in this case on March 28, 1955, have not resolved any of these difficulties. Indeed, the absence of an opinion of the court and the contradictory construction given to the section within the three opinions of the six justices who voted for affirmance have enlarged rather than diminished the area of uncertainty in the application of the statute.

Such a result is, perhaps, at least partly inevitable where no single construction of a disputed statute can command

the support of five justices. There are, however, substantial reasons for urging that, in this particular case, reargument may lead to at least some measure of clarification of the issues. Summarily stated, these reasons are as follows:

(1) The constitutional problems which, in the opinion of three justices, require the construction reached by them, were not briefed or argued by counsel. It would seem proper to order reargument so that these as yet unargued constitutional issues may be fully explored.

(2) The opinion of Mr. Justice Frankfurter, which was joined by Mr. Justice Burton and Mr. Justice Minton, is itself unclear. It contains two separate, and contradictory, constructions of the statute. One construction—that Section 301 is to be read as giving procedural directions to the Federal Courts, rather than as a grant of jurisdiction—would invalidate almost every decision heretofore rendered by the lower federal courts under Section 301. The other construction—that Section 301 is a grant of jurisdiction but not over suits by unions where the compensation of employees is involved—would only invalidate half of the decisions of the lower federal courts, but itself contradicts the very premise and argument upon which the opinion rests. Reargument would provide an opportunity to clarify these uncertainties.

(3) The opinion of the Chief Justice, which was joined by Mr. Justice Clark (as well as, perhaps, the opinion of Mr. Justice Reed) overlooks one aspect of the relief sought by the union in this case. Even if, contrary to our prior contentions, the statute is to be construed in the manner indicated in those opinions, the judgment below should be reversed, not affirmed. The cause should be remanded for consideration by the court below of the union's request for relief on *its* (not the employees') contract.

(4) When this case was argued, counsel for both sides accepted the view of the court below that federal law governed as to the nature of the substantive rights created by a collective agreement. Hence the law of Pennsylvania on this question was not presented by either counsel to the Court. It now appears, however, that in the view of four (or perhaps more) justices of this Court state law is relevant in suits brought under Section 301. If this is so, it is relevant to show, as we believe it can be shown, that under Pennsylvania law a union has an enforceable substantive interest in the performance of *all* of the provisions of the collective bargaining agreement which it has negotiated. At the very least, counsel should be permitted to argue as to whether the cause should be remanded to the Court of Appeals to permit that Court to make a determination as to state law.

(5) The fact that a full Court will be able to participate on reargument increases the possibility that, on such reargument, some clarification of the construction of Section 301 by this Court will be achieved.

Each of these five grounds is more fully set forth below.

1. *The Constitutional Issue Has Not Been Briefed or Argued.* In our brief on the merits in this case we did note the possible existence of a constitutional question as to whether, consistent with the provisions of Article III of the Constitution, Congress could grant jurisdiction to the Federal courts over suits for breach of collective agreements without creating a federal substantive law governing such suits. We did not, however, argue this constitutional issue because both parties accepted the view of the court below that federal law governed the substantive rights of the parties in suits brought under Section 301. Counsel for the respondent also noted the existence of a constitutional issue under Article III but also assumed that Congress intended to create a federal substantive right. As stated by counsel, "he

only need argue that any federal substantive right which might have been created by Congress cannot encompass the claim asserted by petitioner." (Respondent's Brief, p. 38).

The opinion of Mr. Justice Frankfurter, in which Justices Burton and Minton concurred, thus rests on an express desire to avoid a constitutional difficulty which has been neither briefed nor argued by counsel in this case because both counsel adopted a premise, deemed unacceptable by these Justices, that Congress intended to create a federal substantive law for suits brought under Section 301. It would be entirely proper and, we believe, desirable to order that this case be reargued so that counsel can present argument on this constitutional issue. Indeed, if constitutional doubts are to be given a controlling, or even persuasive, effect on the interpretation to be given Section 301, it is respectfully suggested that it would not be inappropriate to invite the Solicitor General of the United States to submit his views to the court in accordance with provisions of 28 U.S.C. § 2403.

2. *The Opinion of Mr. Justice Frankfurter.* The opinion of Mr. Justice Frankfurter, with which Mr. Justice Burton and Mr. Justice Minton joined, contains within itself two conflicting interpretations of the meaning of Section 301. In its early portions the opinion appears to say that all Section 301 does is to give "procedural directions to the federal courts." (Slip Sheet Op., p. 5, p. 11). As Mr. Justice Frankfurter phrased the Congressional intention, the district judges were simply told that when a union appeared in a case involving breach of a collective agreement, it should be treated "as though it were a natural or corporate legal person."

If this language means what it appears to mean, Section 301 is deprived of its character as a grant of jurisdiction. Its only effect is to give unions a capacity to sue and be sued in cases, involving collective agreements, in which federal

jurisdiction can be found independently of the provisions of Section 301.

Almost all of the opinion is consistent with this apparent construction of the statute. Indeed, most of the argumentation in the opinion rests on this construction.

Thus, the opinion—as we understand it—rejects the view that Congress intended a federal substantive law to govern in suits brought under Section 301. But it then proceeds to point out that a serious question of constitutionality would arise from the grant of jurisdiction to federal courts over a contract governed entirely by state law (pp. 12-14). And it concludes, after again rejecting the possibility that Section 301 should be treated as substantive legislation (pp. 14-21), that the serious constitutional problem may, and indeed must, be avoided through "the orthodox process of limiting the scope of doubtful legislation." (p. 21.)

If the statute is construed as not being a grant of jurisdiction at all so that its only effect is to give unions the capacity to sue and be sued on their contracts where federal jurisdiction otherwise appears, the argument supports the conclusion. A bare grant of federal jurisdiction in the absence of diversity would pose serious constitutional questions. To avoid this question, the courts can either read a federal substantive law into the statute, or can read the statute as not being a jurisdictional grant at all. For the reasons stated, the opinion prefers the latter result, hence Section 301 is construed as not giving jurisdiction in any case where federal jurisdiction is not otherwise present.

If the opinion clearly reached this result, we might disagree both as to the premises and as to the conclusion, but at least we could understand—and the lower federal courts could understand—how Section 301 has been construed.

Unfortunately, however, the opinion, which begins with this construction of Section 301, ends with the conclusion that the section must be read as not giving jurisdiction to the federal courts in cases "based upon an employer's failure

to comply with terms of a collective agreement relating to compensation." It appears to be assumed, in the concluding discussion on pp. 22-23 of the opinion, that Section 301 *is* a grant of Federal jurisdiction—but not for suits by unions to recover compensation for individual employees.

This construction not only seems to contradict the specific construction spelled out in quotation marks on page 5 of the opinion. It also seems to make irrelevant almost all of the argument on the preceding 20 pages. If Section 301 *is* a grant of Federal jurisdiction, then no constitutional problems have been avoided "through the orthodox process of limiting the scope of doubtful legislation."

The constitutional problem presented when a union sues a company under Section 301 is no greater than when a company sues a union. It does not avoid any constitutional issue to construe the statute as permitting companies to sue unions but not as permitting unions to sue companies. Nor does it fairly eliminate "opportunities for forum-shopping" to say that this shopping is to be restricted to employers.

Furthermore, if, as the opinion says, the applicable substantive law is state law and if state law recognizes a right in the union, it is impossible to read the language of Section 301 as granting Federal jurisdiction but excluding it in this case. "Suits for violations of contracts between an employer and a labor organization" the statute says, may be brought in the District Courts. If we are to look to Pennsylvania law to find out what a contract between an employer and a labor organization is, and who has substantive rights in it, then we must assume here that there is a contract between this employer and this labor organization, that it does govern the compensation of employees, that the labor organization has a substantive interest in its performance, and that this interest is enforceable by a suit at law. This interest is the same, under state law, as the union's interest in the check-off or any obligation of the employer not involving benefits to the employee. (See *infra*, p. 12). We

know of no way in which, if state law is applicable, this suit can be distinguished from any other suit by a union. And we know of no way in which the Congressional language can be construed as giving the federal courts jurisdiction over suits for breach of collective agreements but only where the employer is suing.

We concede that "nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here." Indeed, we go further. Nowhere in the legislative history is there any indication that Congress believed that employers ever violated collective agreements. There is no recognition, in the Congressional discussion, of this type of suit or of *any* type of suit brought by a union.

But, surely even the 80th Congress could not have passed —and did not pass—a statute which permitted only employers to sue on collective agreements. Believing, as it did, that only unions violated collective bargaining agreements, Congress was willing to be "fair" and allow suits by either party to such agreements. The fact that, after seven years, one case in which a union brought suit on a collective agreement has reached this Court, should not persuade the Court that it is necessary to deprive the unions of the balance which Congress provided in order to close "the doors of the federal courts to a potential flood of grievances." [1]

For all of these reasons we believe that, of the two constructions of Section 301 contained in the opinion of Mr. Justice Frankfurter, the one set forth clearly on page 5 is more sensible than the one which appears to be intended on pp. 21-22. We prefer to think that the former is the intended construction. But, we submit, it would be far better if the matter were settled by a new or amended opinion,

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[1] That there is no such "potential flood" is shown by the fact that in seven years, only approximately 37 reported cases were brought by unions under Section 301. The reason, of course, is that about 90% of all collective agreements provide for final and binding arbitration of grievances. See Brief For Petitioner, pp. 47, 64, and authorities there cited.

after reargument in which all of the considerations could fully be argued by both parties.

3. *The Opinions of the Chief Justice and Mr. Justice Reed.* The opinion of the Chief Justice, which Mr. Justice Clark joined, avoids discussion of both the constitutional issue discussed by Mr. Justice Frankfurter and the question of the applicable substantive law in suits brought under Section 301. The opinion says simply that neither the language nor the history of Section 301 indicates that Congress intended a union to be able to bring a suit such as this one. The opinion of Mr. Justice Reed discusses the constitutional issues but comes to substantially the same conclusion.

In both opinions, this suit is thought not to be within the scope of Section 301 because, in the Chief Justice's words, it is brought by the union to enforce "the uniquely personal right of an employee for whom it bargained to receive compensation for services rendered his employer."

But even if we assume, in accordance with these opinions, that Congress did not intend to authorize a union to sue to enforce the personal rights of the employees, there still remains in this case the question as to whether the union can sue here to enforce *its* rights in the contract which it nas made.

For the reasons which we set forth in our brief, we do not believe it is proper to separate the union's interest in the performance of a collective agreement for the employees' interest. But, if we accept the separation, and if we exclude the individual's interest in the particular wages due him from the scope of the statute, the complaint here still comes within the statute.

The union here asked for two kinds of relief. It asked the court to decide that the company had adopted a rule, which it applied so as to reduce the compensation of more than 4,000 employees, which violated the terms of the contract as to salaries between the company and the union.

It also asked the Court to order an accounting by the company as to the amounts wrongfully so deducted and to issue judgment in favor of the individual employees for such amounts. (R. 7.)

We here assume, with the Chief Justice, Mr. Justice Clark, and Mr. Justice Reed, that the union could not properly ask for the latter relief under Section 301. But what of the union's claim for declaratory relief that the company had adopted a rule, applicable in general to all employees, which is contrary to the terms of the promise which the company made to the union?

The union here asked for an adjudication of the meaning of the contract which the union, and not any employee, has negotiated with the company. The claimed violation of the agreement had nothing to do with the services rendered by any particular employee. To the contrary, the union claimed that the employer had agreed with it to pay all of the employees on a salary basis and not to make deductions from that salary on an hourly basis, for time lost. It claimed that this had been the prior interpretation and application of the agreement. It claimed that the company changed the rule, in violation of the agreement, and made deductions, on a uniform basis, from the salaries of 4,000 employees. It sued not only to enforce the "uniquely personal" rights of these 4,000 employees, but also to enforce the company's promise to the union that it would pay all employees on a salary basis and would "administer the provisions of this Agreement in good faith." (R. 9.)

Put in another way, the matter comes down to this. The claim for declaratory relief does not involve any dispute as to the salary rate at which any particular employee is to be paid. It does not involve any dispute as to the amount which was paid to any particular employee or as to the deductions which were made by the Company. It involves only one dispute: whether, under the terms of the collective agreement, the Company has the right to impose

a general rule that all employees who lose time shall have hourly deductions made from their monthly salaries. The action of the company was not taken with respect to a particular employee and it was not claimed that particular employees have uniquely personal reasons for protesting the action. The only question presented is whether the company has adopted a practice, with respect to all of the employees, which violates its contractual agreement with the union.

It is possible, of course, that if this case goes to trial, individual differences and issues may develop. And, if they do, the view of the Chief Justice and Mr. Justice Clark would perhaps be that the adjudication of these "uniquely personal rights" would not be within the scope of the action permitted by Section 301. But the union has asked here, not only for payment to the individuals, but also for declaratory relief as whether the Company, in making deductions from salaries, is in violation of its agreement with the union. There is nothing personal about that kind of relief. And, we submit, there is nothing in the Congressional language, history or discussion which would indicate that such relief is to be excluded from the scope of the statute.

We have already adverted to the legislative language and history (*supra*, p. 7). Omitting all subtleties and sophistications, it is crystal clear, and not subject to any doubt, that Congress intended *both* unions and employers to be able to sue under Section 301. The statute says so. The House committee report says so.[2] The Senate committee report says so.[3] The Conference committee report says so.[4]

It is also clear that Congress' attention was focussed ex-

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[2] ". . . Actions and proceedings involving violations of contracts between employer and labor organizations may be brought *by either party* . . ." (House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 46-47 (emphasis added)).

[3] "The Committee bill makes collective bargaining contracts equally binding, and enforceable *on both parties.*" Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., p. 14 (emphasis added).

[4] House Conf. Rept. No. 510, on H.R. 3020, 80th Cong., 1st Sess., pp. 65-66.

clusively on cases in which unions had violated collective agreements. The motivating force behind the Congressional action, without doubt, was the desire to have judgments rendered against unions for such violations, and the assumed difficulty of obtaining those judgments in the state courts. But, whatever the motive for the legislation, it was clearly the intention that the statute should permit both sides to sue. Concededly, because the attention of Congress was exclusively on cases in which unions violated their agreements, there was no indication of what particular kind of suit by a union was meant to be included. The intention simply was to balance the grant of jurisdiction over suits *against* unions with a similar grant of jurisdiction over suits *by* unions.

If the declaratory relief requested here is to be denied to unions then the Court is, in substance, rewriting the statute to provide only that employers can sue in the federal courts. Unions exist for the purpose of negotiating contracts with employers that specify the rules governing the payment of wages, hours and working conditions to employees. If a union cannot prosecute, under Section 301, a claim that an employer has misconstrued such a contract and, pursuant to that misconstruction, imposed a rule in violation of the contract, then the Congressional grant of jurisdiction over suits on collective agreements both against and by unions is rendered a fraud. For all substantial purposes the statute is rewritten as authorizing suits only against unions.

4. *The Pennsylvania Law Was Not Before the Court.* Because *both* parties accepted the premise of the Court of Appeals that federal law governed any actions brought under Section 301, the substantive law of Pennsylvania and its possible application in this suit was neither briefed nor argued. But the premise on which both counsel relied is incorrect, or only partially correct, as we understand the views of at least four of the Justices concurring in the affirmance here. Under these circumstances, it would seem

to us that the law of Pennsylvania is a relevant consideration. The Court either should have the applicable Pennsylvania law before it in making its decision or should remand the case to the Court of Appeals for consideration of that law.

We think that examination of the law of Pennsylvania with respect to collective bargaining agreements will establish without doubt that unions are regarded by the Pennsylvania courts as having a substantive legal interest in the performance by the employer of this agreement with the union to pay wages, salaries, and other benefits to the employees. Indeed, prior to 1933 *only* the union was regarded as having a right to enforce what the Chief Justice here has called "the uniquely personal right of an employee." [5]

If, as Mr. Justice Reed says, a considerable amount of state law may be applied in suits under Section 301, certainly argument should be heard by the court on the question as to whether in the present case state law does not create a substantive right in the union with respect to the performance by the employer of his agreement with the union to pay wages and salaries to employees in accordance with the terms of the collective agreement.

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[5] Thus, in *Babbitt* v. *Wilmer & Vincent, Inc.*, 14 Lehigh County L. J. 97 (1930) an employee was denied the right to sue to obtain wages lost by a discharge claimed to be in violation of a collective agreement. The court agreed that collective bargaining agreements were enforceable agreements. "They possess every ingredient of a contract," it said. But the employee could not sue because he was a third party beneficiary and, in Pennsylvania, only the contracting party, not the third party beneficiary, could sue on such a contract. Subsequently in *Roberts* v. *Penn Tobacco Co.*, 34 Luzerne Leg. Reg. 237 (1939) a similar employee suit was sustained solely because the Supreme Court of Pennsylvania had, in the interim, reversed its position as to the rights of third party beneficiaries. *Commonwealth* v. *Great American Indemnity Co.*, 312 Pa. 183, 167 Atl. 793 (1933). In *Yost* v. *Finch*, 32 Berks C. L. J. 68 (1939) a suit in equity by a union to determine whether the employer was liable under a collective bargaining agreement to six discharged employees was permitted to be maintained. See also *United Mine Workers* v. *Monheim*, 11 Fayette Legal Journal 17 (1947) (vacation pay); *Chernko* v. *Moore*, 64 D. & C. 638 (1948) (employee permitted to sue as donee beneficiary); *Joint Board, Waist & Dressmakers Union* v. *Rosinski*, 177 Pa. Super. 303 98 A. 2nd 447 (1953); *Arbechesky Unemployment Compensation Case*, 174 Pa. Super. 217, 223, 100 A. 2nd 396 (1953).

If, as Mr. Justice Frankfurter says, state and not federal law is to "identify the nature of the legal relations created by a collective contract" (p. 17) and if § 301 is to be read as a grant of jurisdiction over suits for breach of such contracts, certainly the Pennsylvania law should be considered in determining whether this suit is a suit for breach of contract.

5. *The presence of a full court on reargument.* Nothing additional need be said about the fifth ground set forth for rehearing. The possibility that reconsideration of the questions in this case by the eight Justices who participated in the decision will lead to a clarification of the Court's position as to the meaning of Section 301 is obviously enhanced by the presence of an additional Justice who can add his weight to the collective consideration of the Court.

The Court has itself recognized the value of a full bench by postponing argument in a number of difficult cases. The fact that the difficulties in resolving the issue in this case became apparent after argument should, we submit, justify reargument before a full bench.

CONCLUSION AND CERTIFICATE

For the reasons above set forth, it is respectfully requested that this Court restore this case to the docket and order reargument. In accordance with Rule 58 counsel certify that this petition is presented in good faith and not for delay.

Respectfully submitted,

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